United States Court of Appeals
for the Second Circuit

APPENDIX

77-6124
77-3047

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES COURT OF APPEALS
FILED
AUG 15 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOEL HARNETT, et al.,

Plaintiffs-Appellees,

v.

SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellant,

and

EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES,

Defendant.

Appeal from the United States District Court
for the Southern District of New York

IN RE SECURITIES AND EXCHANGE COMMISSION, PETITIONER

Petition of the Securities and Exchange Commission for Writs of Mandamus and Prohibition to the Honorable Vincent L. Broderick, United States District Judge, United States District Court for the Southern District of New York

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APPENDIX

HARVEY L. PITT
General Counsel

PAUL GONSON
Associate General Counsel

Securities and Exchange Commission
Washington, D.C. 20549
(202) 755-1108

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JUN 27 1977
OFFICE OF GENERAL COUNSEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 CIV. 3110

JUDGE BRODERICK

-------------------------x

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs,

-against-

SECURITIES AND EXCHANGE COMMISSION
and EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

Defendants.

-------------------------x

1977 JUN 22

Plaintiffs, for their complaint, by GORDON MARSHALL, their attorney, respectfully allege as follows:

FIRST: That the plaintiff JOEL HARNETT is a resident and citizen of the City of New York and is an announced candidate for the office of Mayor of the City of New York and is campaigning for the designation of the Democratic Party in the Democratic Primary in the City of New York.

SECOND: That at all the times hereinafter mentioned the plaintiff SAVE OUR CITY, INC. is and was a Not For Profit Corporation organized and existing pursuant to Section 402 of the

Not For Profit Corporation Law of the State of New York and has its principal place of business at 575 Lexington Avenue, City, County and State of New York.

THIRD: That among the corporate purposes of SAVE OUR CITY, INC. is:

(a) To secure and maintain an efficient and responsible form of government for the City of New York.

(b) To foster a separation of the affairs of the City of New York from partisan political consideration.

(c) To establish and maintain honest and fair methods of nominating and electing municipal officers in the City of New York.

(d) To improve the economic and social conditions of the people of the City of New York.

(e) To foster the effective use of the powers and facilities of the State and National Governments to improve the living conditions of the people of the City of New York and the Greater Metropolitan Area of New York.

(f) To espouse the cause of better government and to devise ways and means for improving national, state and municipal legislation, the administration of justice and the enforcement of law..

(g) to Inquire into political and civic abuses and to seek reformation thereof.

(h) To support candidates for office in the City of New York who subscribe to the foregoing principles.

FOURTH: The plaintiff GORDON MARSHALL is a resident and citizen of the City of New York.

FIFTH: This action is being commenced under and pursuant to Title5 United States Code Annotated Section 553, popularly referred to as the Freedom of Information Act.

SIXTH: That pursuant to Title 5 United States Code Annotated Section 552 the United States District Court for the Southern District of New York has jurisdiction to enjoin the defendants from withholding agency records and to order the production of any agency records improperly withheld from the complainants.

SEVENTH: The SECURITES AND EXCHANGE COMMISSION and the EXECUTIVE OFFICE OF THE PRESIDENT are defined as agencies over which this Court has jurisdiction pursuant to Title 5 United States Code Annotated Section 552.

EIGHTH: Upon information and belief the SECURITIES AND EXCHANGE COMMISSION commenced an investigation on or about and during the month of January 1976 into all of the circumstances surrounding the promotion and sale of municipal bonds and securities of the City of New York and the financing of the City of New York both with respect to the involvement, participation and connivance of the municipal and state governments and officials thereof and with respect to the participation, involvement [illegible] connivance of brokerage firms, banks and other financial institutions, municipal labor unions, pension and trust funds and others in connection with the promotion, sale and offering for sale to the public of municipal bonds and other municipal securities both before and after public realization that the City of New York was in dire financial difficulty and distress and was without adequate resources to meet its obligations, as well as with respect to the sale of municipal bonds and other securities to the public by various insiders to the public before it became public knowledge that the City of New York was in dire financial distress.

NINTH: Upon information and belief the SECURITIES AND EXCHANGE COMMISSION has conducted a thorough and complete investigation as to all areas of the circumstances relating to the sales of securities to the public in order to finance New York City.

BEST COPY AVAILABLE

__TENTH__: Upon information and belief the SECURITIES AND EXCHANGE COMMISSION has not limited its investigation to the sale of municipal securities by the City of New York but has also investigated the sale of municipal securities by other governments throughout the United States.

__ELEVENTH__: Upon information and belief the investigation by the SECURITIES AND EXCHANGE COMMISSION with respect to the sale of New York City municipal bonds and other securities has been completed.

__TWELFTH__: Upon information and belief the report by the SECURITIES AND EXCHANGE COMMISSION with respect to the sale of New York City municipal bonds and other securities has been completed.

__THIRTEENTH__: Upon information and belief the attorney employed by the SECURITIES AND EXCHANGE COMMISSION in the New York City region has completed his duties with respect to the investigation by the SECURITIES AND EXCHANGE COMMISSION and with respect to the report and has voluntarily terminated his employment and association with the SECURITIES AND EXCHANGE

COMMISSION and has or is about to enter into an association or partnership with a law firm in the New York City area.

FOURTEENTH: Upon information and belief both the investigation and report of the SECURITIES AND EXCHANGE COMMISSION have long since been completed.

FIFTEENTH: Upon information and belief the SECURITIES AND EXCHANGE COMMISSION announced at the commencement of its investigation that all aspects of its investigation and the results thereof would be fully and completely reported to the public and that recommendations would be made as to whether or not additional legislation would be recommended so as to insure adequate protection to the public in the future.

SIXTEENTH: Upon information and belief that despite the completion of the investigation and the report of the SECURITIES AND EXCHANGE COMMISSION, the results of the investigation and the report of the SECURITIES AND EXCHANGE COMMISSION has not been released to the public as of the date of the commencement of this action.

SEVENTEENTH: That the New York State Legislature, (following the veto by Governor Hugh Carey during March 1977 of a bill enacted by the State Legislature calling for an early Primary Election in the State of New York and for the office of Mayor and various other offices in the government of the City of New York), enacted a law providing for a Primary Election to be held on September 8, 1977.

EIGHTEENTH: That during the period of June 7, 1977 through and including July 7, 1977 various announced and unannounced candidates for the office of Mayor of the City of New York and for the designation of various political parties for such offices have been and are circulating petitions pursuant to the Election Laws of the State of New York for the purpose of obtaining sufficient signatures as required by the Election Laws to appear on the ballot on September 8, 1977.

NINETEENTH: Upon information and belief that among the announced and unannounced candidates in the Primary Election are individuals who are presently in public office and formerly were in public office (whether at a city, state or national level), some of whom have been involved in the affairs of the City of New York, the budget of the City of New York, the disbursement and accounting of and for the property, assets, expenses and disbursements for the City of New York and indeed the sale of the municipal bonds and securities of the City of New York, both before, during and after the public awareness of the dire financial situation of the City of New York

TWENTIETH: Upon information and belief that there are, among the backers, donors and supporters of some of the announced candidates for the office of Mayor of the City of New York and other offices in the city government banks, financial institutions, municipal labor unions and other groups and businesses and individuals and officers and directors of such institutions who were directly or indirectly involved and/or connected with the sale of municipal bonds and securities both before, during and after the public disclosure of the dire financial condition of the City of New York.

TWENTY-FIRST: That the people of the City of New York have a right to know all of the details with respect to the sale to the public of the municipal bonds and other securities of the City of New York at a time when the City was without adequate resources to meet its obligations both with respect to such sales as were made by the City through brokerage houses and other outlets and with respect to sales by insiders who knew of the true conditions of the City of New York but failed to disclose such conditions to the public.

TWENTY-SECOND: That it has been a basic democratic tenet that an informed citizenry is a powerful citizenry.

TWENTY-THIRD: That the citizens of the City of New York are entitled to know at this time all of the relevant facts and circumstances with respect to the candidates and their backers in order to intelligently exercise their sacred privilege and franchise to designate by signing petitions of those individuals who merit the placing of their names on the ballot in Primary Elections; to vote for those individuals meriting their vote in Primary Elections and to vote for those individuals in General Elections whom the people in their wisdom feel should be elevated to hold office in the municipal government of the City of New York.

[redacted]

TWENTY-THIRD (A): That the Election Laws of the State of New York require the filing of reports as to the identity of contributors and amount of contributions to candidates and require filings during the periods immediately prior to election within twenty-four hours with respect to any contribution in excess of $1,000.00.

TWENTY-THIRD (B): That the public policy favoring disclosure of backers of candidates is thwarted by the failure of the defendants to release the results and reports of the investigation into the sale of municipal securities of the City of New York.

BEST COPY AVAILABLE

TWENTY-FOURTH: Upon information and belief that the Commissioners of the SECURITIES AND EXCHANGE COMMISSION have failed and refused to vote to release the SECURITIES AND EXCHANGE COMMISSION report with respect to the situation in the City of New York.

TWENTY-FIFTH: That the failure of the SECURITIES AND EXCHANGE COMMISSION to release the results of its investigation and to release its report to the public has exactly the same effect and result at this critical time for the City of New York as if a deliberate coverup had been conceived and executed to keep the electorate in the dark and to prevent the electorate from having full access to all relevant facts to intelligently determine through the Primary selection, designation and election procedures and subsequently in the General election those office seekers to whom the reins of government should be entrusted during the next four years.

TWENTY-SIXTH: Upon information and belief the report of the SECURITIES AND EXCHANGE COMMISSION reads like a Who's Who of government and business and will disclose information that is essential to be disseminated among the public so that they can elect leaders who will avoid a repetition of the scandalous decline of the City of New York under recent governments.

TWENTY-SEVENTH: That on or about the 18th day of April, 1977 the plaintiff GORDON MARSHALL, acting on behalf of the plaintiff JOEL HARNETT, wrote a letter to the HON. HAROLD WILLIAMS, Chairman of the Securities and Exchange Commission, as follows:

> "Dear Mr. Williams:
>
> "I would appreciate your furnishing to me by return mail a copy of the SEC Report on the results of its investigation of the sale of New York City bonds and securities and whether or not such sale and the practice involved in the disclosure of city financial information is deemed to have been a deception of the public.
>
> "In view of the fact that a mayoralty campaign is about to begin, I think that I and the other citizens of New York should be the beneficiary of the results of your investigation in order to intelligently be able to exercise our voting franchise and privilege.
>
> "I call upon you pursuant to the "Sunshine Laws" to make such disclosure of your reports on such subject matter to me by return mail.
>
> Yours very truly"

TWENTY-EIGHTH: That despite repeated telephone calls to Chairman WILLIAMS and to members of the staff of the SECURITIES AND EXCHANGE COMMISSION, no written response was received until May 6, 1977, when a letter was mailed by the General Counsel of the SECURITIES AND EXCHANGE COMMISSION stating as follows;

> "Dear Mr. Marshall;
>
> As you are aware, Chairman Williams had asked me to respond to your letter of April 18, 1977, regarding the Commission's investigation of transactions in the securities of the City of New York and related matters.
>
> "On May 2, 1977, I discussed your letter with you, and advised you that it is not appropriate for me to offer you a specific date on which the results of the Commission's New York City investigation will be made public. As I also assured you, however, the Commission is cognizant of many of the concerns expressed in your letter, and that the staff is making every effort to expedite the investigation.
>
> "I was, however, disappointed to see distorted references to our telephone conversation in a recent press release, issued by a candidate you apparently are supporting for Mayor of New York City.
>
> Sincerely,
>
> Harvey L. Pitt
> General Counsel"

THIRTY-NINTH: That the response of HARVEY L. PITT was not responsive to the request for the information made by said plaintiff pursuant to Title 5 United States Code Annotated Section 552.

THIRTIETH: Title 5 United States Code Annotated Section 552(6)(A)(i) requires that each agency upon any request for records shall determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination.

THIRTY-FIRST: That the response of HARVEY L. PITT dated May 5, 1977 was not responsive to the request of said plaintiff, was not communicated to said plaintiff within ten days after receipt, failed to advise said plaintiff of the reasons for the denial of said request and failed to advise said plaintiff of the right to appeal to the head of the agency any adverse determination.

THIRTY-SECOND: That as a result of said failure to comply with said provisions of Section 552, Title 5 United States Code Annotated Section 552(6)(C) provides that said plaintiff shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply within the applicable time limit provisions of said paragraph.

THIRTY-THIRD: That as a result of the failure of the SECURITIES AND EXCHANGE COMMISSION to comply with Section 552, the District Court of the United States for the Southern District of New York has immediate and exclusive jurisdiction for the relief requested herein.

THIRTY-FOURTH: That on or about the 11th day of May, 1977 the plaintiff GORDON MARSHALL on behalf of the plaintiff JOEL HARNETT wrote a further letter to HARVEY L. PITT, General Counsel of the SECURITIES AND EXCHANGE COMMISSION, as follows:

> "Dear Mr. Pitt:
>
> Thank you for your letter of May 6, 1977.
>
> "I had been advised that I would receive a letter from Chairman Williams and to the extent that Chairman Williams has not personally replied to me I am disappointed.

"I think the matter is of such importance that it merits a reply from Chairman Williams as well as his personal attention.

"I am further disappointed in that your letter under date of May 6, 1977 is completely unresponsive. I did take note of the fact that you no longer claim that the investigation is still in progress.

"With respect to your statement of an alleged distortion in references to our telephone conversation of May 2, 1977, I read the press releases and I see no distortion. If you would please advise me as to what you claim is distorted, if I agree with you I would be happy to issue a retraction.

"In the meantime, I would appreciate a meaningful reply from Chairman Williams to my letter of April 18, 1977.

THIRTY-FIFTH: On May 20, 1977 Mr. PITT terminated the communication between the plaintiff GORDON MARSHALL and the SECURITIES EXCHANGE COMMISSION by a letter in complete non-compliance with Section 552 as follows:

"Dear Mr. Marshall:

"I am replying to your letter of May 11, 1977, in order to set the record straighton the following points:

1. The letter you received from me on May 6, 1977, was fully consistent with any and all oral discussions you have had with me and members of the Commission's staff;

2. Your earlier letter received a complete and responsive reply from me, and received the attention to which it was entitled;

3. Your letter, dated May 11, 1977, purports to take "note of [certain] fact[s] ***." Your interpretations of my letter are solely your own, and my silence does not connote acquiescence in them;

4. Your press release was distorted because it attributed two comments to me, personally, that I did not make, and that you knew I did not make -- your careful elimination of quotation marks makes that evident. I do not, however, wish you to issue any retraction any more than I desired to see my name associated with a political candidate;s press release. I am a government official with no interest in the political fortunes of any candidate, or alleged candidate, for any office, and I deemed it highly improper for you to use my name in any way in that context. A retraction would only heighten that problem.

Since no purpose would be served by further, extended, discussions of these matters, I trust that this will terminate your correspondence with us.

Sincerely,

Harvey L. Pitt
General Counsel"

THIRTY-SIXTH: On the 5th day of May, 1977, the plaintiffs JOEL HARNETT and SAVE OUR CITY, INC. wrote to the

EXECUTIVE OFFICE OF THE PRESDENT by writing to the President of the United States.

THIRTY-SEVENTH: A copy of the letter of said plaintiffs to the President dated May 5,1977 is annexed hereto, made a part hereof and marked Exhibit "A".

THIRTY-EIGHTH: That on the 20th day of May, 1977 the SECURITIES AND EXCHANGE COMMISSION, Office of Consumer Affairs, wrote a letter to the plaintiff JOEL HARNETT, a copy of which is annexed hereto, made a part hereof and marked Exhibit "B".

THIRTY-NINTH: The EXECUTIVE OFFICE OF THE PRESIDENT has failed to comply with the time limitations provided by law within which a response should have been given to said plaintiff's request and the letter of the SECURITIES AND EXCHANGE COMMISSION with respect to the letter addressed to the President is and was completely unresponsive to the demand made under the Freedom of Information Act by the plaintiffs.

FORTIETH: The EXECUTIVE OFFICE OF THE PRESIDENT failed to make any response within ten days after receipt of said plaintiffs' request and failed to comply with such request and failed to notify said plaintiffs of the reasons required by law to be given and failed to make a determination within ten days after receipt of the request that the request would be complied with and failed to notify the plaintiffs of their right to appeal to the head of the EXECUTIVE OFFICE OF THE PRESIDENT any adverse determination.

FORTY-FIRST: That the failure of the EXECUTIVE OFFICE OF THE PRESIDENT to comply with the provisions of Section 552 in not complying with the applicable time limit provisions of Section 552 grants to the plaintiffs immediate relief to this Court and grants to this Court immediate jurisdiction, the plaintiffs having been deemed by said section to have exhausted plaintiffs' administrative remedies.

WHEREFORE, plaintiffs demand judgment against the defendants as follows:

(a) enjoining the SECURITIES AND EXCHANGE COMMISSION and the EXECUTIVE OFFICE OF THE PRESIDENT from withholding any records and reports concerning the investigation by the SECURITIES AND EXCHANGE COMMISSION into and relating to the sale of municipal bonds and securities of the City of New York; and

(b) ordering the SECURITIES AND EXCHANGE COMMISSION and the EXECUTIVE OFFICE OF THE PRESIDENT to produce and deliver to the plaintiffs any and all records and reports of the SECURITIES AND EXCHANGE COMMISSION and the EXECUTIVE OFFICE OF THE PRESIDENT concerning the investigation by the SECURITIES AND EXCHANGE COMMISSION into and relating to the sale of municipal bonds and securities of the City of New York; and

(c) ordering the SECURITIES AND EXCHANGE COMMISSION and the EXECUTIVE OFFICE OF THE PRESIDENT to immediately deliver all such records and reports to this Court for examination "in camera" by this Court to determine whether such records and reports or any part thereof should be withheld under any of the exemptions set forth in subsection (b) of Title 5 United States Code Annotated Section 552; and

(d) awarding in favor of the plaintiffs and against the defendants all reasonable attorneys' fees and other litigation costs reasonably incurred in this action under and pursuant to Title 5 United States Code Annotated Section 552(F); and

(e) such other and further relief which may be deemed proper and appropriate by this Court.

Dated, New York, New York
June 27, 1977

GORDON MARSHALL
Attorney for Plaintiffs
Office & P. O. Address
60 East 42nd Street
Borough of Manhattan
New York, New York 10017
(212) 661-1640

Save our City with JOEL HARNETT as Mayor
SAVE OUR CITY, INC., SUITE 2703, 575 LEXINGTON AVE., NEW YORK, NY 10022
(212) 688-4646

May 5, 1977

The President
The White House
Washington D.C. 20500

Dear Mr. President:

The Securities and Exchange Commission has been investigating the sale of New York City securities during the past few years and the possibility of the commission of fraud or violation of other laws involving deception of the public by city officials, banks, brokers and others.

The people of the City of New York are faced with the solemn responsibility of selecting a Mayor and other public officials beginning with the solicitation of signatures on primary petitions commencing June 7th. To act responsibly, signers have a right to know what involvement, if any, potential candidates had in the sale of the bonds and if there was fraud.

During the past month, I have repeatedly requested that the Chairman of the SEC release the report. He has not done so. Therefore, I respectfully request that you direct the Chairman of the Securities & Exchange Commission to order the completion and release of the report no later than June 1, 1977.

Any delay in the release of such report could have the appearance of a cover-up. Indeed, delay would have the same effect as a cover-up.

I, therefore, urge you to act immediately and use the power of your office to enlighten and educate the electorate so they can exercise their precious right to vote intelligently.

As an announced independent candidate for Mayor of New York, in the Democratic primary and as the former Chairman of the City Club of New York, a non-partisan good government organization, you can well understand my concern for my City.

Respectfully,

Joel Harnett

Joel Harnett

CC: Senator William Proxmire
Senator Daniel P. Moynihan
Senator Jacob Javits
Midge Costanza

EXHIBIT A

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
CONSUMER
AFFAIRS

MAY 20 1977

Mr. Joel Harnett
2 Sutton Place South
New York, New York 10022

Dear Mr. Harnett:

This is to acknowledge receipt of your mailgram dated May 5, 1977, addressed to the President, which was referred to the Securities and Exchange Commission.

The Commission maintains constant surveillance over the securities markets, the activities of brokers and dealers and the offer and sale of securities in order to detect and prevent manipulation of markets, illegal or fraudulent conduct by brokers and dealers and the illegal or fraudulent distribution of securities by issuers, underwriters and individuals.

Accordingly, we have referred your letter to our Division of Enforcement for their consideration.

Sincerely,

Justin P. Klein
Director

Ceil Charles
By: Ms. Ceil Charles

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, et al.,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants.

77 Civ. 3110

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION TO DISMISS THE COMPLAINT BY THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION

PAUL GONSON
Associate General Counsel

JAMES H. SCHROPP
Special Counsel

JOHN P. SWEENEY
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

WILLIAM D. MORAN
Regional Administrator
New York Regional Office
Securities and Exchange
Commission
26 Federal Plaza
New York, New York 10007
Telephone (212) 264-1636

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, *et al.*,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION,
et al.,

Defendants.

77 Civ. 3110

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION TO DISMISS THE COMPLAINT BY THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION

PRELIMINARY STATEMENT

On June 27, 1977, Joel Harnett, Save Our City, Inc., and Gordon Marshall 1/ filed this action against the Securities and Exchange Commission (the "Commission") and the Executive Office of the President of the United States (the "Executive Office"). This memorandum, filed on behalf of the defendant Commission in support of its motion to dismiss the complaint, will not discuss allegations of the complaint relating to the defendant Executive Office unless pertinent to the Commission's motion to dismiss.

1/ According to the complaint, Mr. Harnett is an "announced candidate" for Mayor of the City of New York (Complaint ¶1). Save Our City, Inc., is alleged to be a Not For Profit Corporation organized under the laws of the State of New York, which apparently supports Mr. Harnett's candidacy (*id.* at ¶¶2 and 3; *see also id.* at Exhibit A). Mr. Marshall seems to be appearing *pro se* "as a resident and citizen of the City of New York" and as attorney for the other plaintiffs (*id.* at ¶4).

In this action, the plaintiffs demand a judgment:

> "(a) enjoining the * * * Commission * * * from withholding any records and reports concerning the investigation by the * * * Commission into and relating to the sale of municipal bonds and securities of the City of New York; and
>
> "(b) ordering the * * * Commission * * * to produce and deliver to the plaintiffs any and all records and reports of the * * * Commission * * * concerning the investigation by the * * * Commission into and relating to the sale of municipal bonds and securities of the City of New York; and
>
> "(c) ordering the * * * Commission * * * to immediately deliver all such records and reports to this Court for examination 'in camera' by this Court to determine whether such records and reports or any part thereof should be withheld under any of the exemptions set forth in subsection (b) of Title 5 United States Code Annotated Section 552 * * *."

The plaintiffs further demand "all reasonable attorneys' fees and other litigation costs reasonably incurred in this action under and pursuant to Title 5 United States Code Annotated Section 552(E) [sic]."

For the reasons set forth below, the Commission moves that this action be dismissed, that the Court find the action to have been instituted frivolously and in bad faith, and that the Commission be awarded the costs of defending this action, including reasonable attorney's fees.

STATEMENT OF FACTS

This action has arisen from nothing more than an exchange of correspondence among the named parties in which no request for specific records was ever made pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. This fact clearly appears from the pertinent portions of the correspondence cited in the complaint (¶¶27-38) and set forth below.

On April 18, 1977, the plaintiff Gordon Marshall sent the following letter to Harold M. Williams, the Chairman of the Commission:

> "I would appreciate your furnishing to me by return mail a copy of the SEC Report on the results of its investigation of the sale of New York City bonds and securities and whether or not such sale and the practice involved in the disclosure of city financial information is deemed to have been a deception of the public.
>
> "In view of the fact that a mayoralty campaign is about to begin, I think that I and the other citizens of New York should be the beneficiary of the results of your investigation in order to intelligently be able to exercise our voting franchise and privilege.
>
> "I call upon you pursuant to the 'Sunshine Laws' to make such disclosure of your reports on such subject matter to me by return mail." 2/

On May 6, 1977, Harvey L. Pitt, General Counsel to the Commission, sent a letter to the plaintiff Marshall, in which he stated:

> "On May 2, 1977, I discussed your letter with you, and advised you that it is not appropriate for me to offer you a specific date on which the results of the Commission's New York City investigation will be made public. As I also assured you, however, the Commission is cognizant of many of the concerns expressed in your letter, and that the staff is making every effort to expedite the investigation." 3/

On May 11, 1977, the plaintiff Marshall responded with a letter to Mr. Pitt, in which he merely requested a response from Chairman Williams:

2/ *See* Complaint ¶27.

3/ *See* *id.* at ¶28.

> "I am further disappointed in that your letter under date of May 6, 1977 is completely unresponsive. I did take note of the fact that you no longer claim that the investigation is still in progress.
>
> * * *
>
> "In the meantime, I would appreciate a meaningful reply from Chairman Williams to my letter of April 18, 1977." 4/

Shortly thereafter, on May 20, 1977, Mr. Pitt sent a further letter to the plaintiff Marshall, in which he informed Mr. Marshall:

> "I am replying to your letter of May 11, 1977, in order to set the record straight on the following points:
>
> "1. The letter you received from me on May 6, 1977, was fully consistent with any and all oral discussions you have had with me and members of the Commission's staff;
>
> "2. Your earlier letter received a complete and responsive reply from me, and received the attention to which it was entitled;
>
> "3. Your letter, dated May 11, 1977, purports to take 'note of [certain] fact[s] * * *.' Your interpretations of my letter are solely your own, and my silence does not connote acquiscence in them * * *.
>
> "Since no purpose would be served by further, extended, discussions of these matters, I trust that

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4/ See id. at ¶34. Mr. Marshall's statement, in his May 11, 1977, letter, that Mr. Pitt did not "claim that the investigation is still in progress" is, quite simply, inexplicable in view of the statement in Mr. Pitt's letter of May 6, 1977, that the Commission's "staff is making every effort to expedite the investigation."

this will terminate your correspondence with us." 5/

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED SINCE IT CONCLUSIVELY DEMONSTRATES ON ITS FACE THAT THE PLAINTIFFS HAVE NEITHER PURSUED NOR EXHAUSTED THE PRESCRIBED ADMINISTRATIVE REMEDIES.

This action was commenced solely under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, 6/ and relies solely upon that Act in invoking the jurisdiction of this Court. 7/ The plaintiffs have alleged that Mr. Pitt's

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5/ See id. at ¶35. In addition to his correspondence with the Commission, the plaintiff Harnett had written a letter to the President of the United States on May 5, 1977, in which he requested the President to "direct the Chairman of the Securities & Exchange Commission to order the completion and release of the report no later than June 1, 1977." See id. at ¶¶36 and 37 and Exhibit A. That letter was referred by the Executive Office to the Commission's Office of Consumer Affairs, which informed Mr. Harnett, by letter dated May 20, 1977, that his letter had been referred to the Commission's Division of Enforcement for their consideration. See id. at ¶38 and Exhibit B.

6/ Complaint ¶5.

7/ Id. at ¶6. This Court would have no other ground for jurisdiction to compel the Commission to release the material which the plaintiffs seek. Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a), provides that: "The Commission may, in its discretion, make such investigation as it deems necessary to determine whether any person has violated * * * any provision of this chapter * * * [and] [t]he Commission is authorized, in its discretion, to publish information concerning any such violations * * *." Moreover, any information or documents acquired during the course of such an investigation shall remain confidential unless the Commission determines that disclosure would not be contrary to the public interest. See 17 CFR 240.0-4. As this Court has previously held, it may not "influence [the Commission's] exercise of discretion" in withholding or publishing such information. Securities and Exchange Commission v. Republic National Life Ins. Co., 383 F. Supp. 436, 438 (S.D. N.Y., 1974). Cf. International Waste Controls, Inc. v. Securities and Exchange Commission, 362 F. Supp. 117 (S.D. N.Y.), affirmed per curiam, 485 F.2d 1238 (C.A. 2, 1973).

letter of May 6, 1977, "was not responsive to the request for information by * * * [the] plaintiff [Marshall] pursuant to" the Freedom of Information Act, 8/ and that, accordingly, the plaintiff Marshall "shall be deemed to have exhausted his administrative remedies * * *." 9/

But, the plaintiffs have made no request in conformance with the requirements of the FOIA. That Act requires that "each agency, upon any request for records which * * * reasonably describes such records and * * * is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person." 5 U.S.C. 552(a)(3) (emphasis added).

The Commission's rules under the FOIA require, consistent with the Act itself, that any request for records "reasonably describes" the records to which access is sought. 17 CFR 200.80(a)(3). In addition, the Commission's procedures for requesting copies of documents pursuant to 5 U.S.C. 552(a)(3) are set forth at 17 CFR 200.80(d)(2) as follows:

> "Requests for copies of Commission records may be made either in person at the public reference room or by mail addressed to the Securities and Exchange Commission, Public Reference Section, Washington, D.C. 20549. Each request for information under the Freedom of Information Act should be clearly and prominently identified by means of a legend on the first page, such as 'Freedom of Information Act Request.' In addition, if sent by mail or otherwise submitted in an envelope or other cover, the front

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8/ Id. at ¶¶29-31.

9/ Id. at ¶32. See also id. at ¶33 (concluding that this Court has "immediate and exclusive jurisdiction for the ruling requested").

> of such envelope or cover should be clearly and prominently marked by a legend such as 'Freedom of Information Act Request.'"

Yet, not only were the plaintiff Marshall's "requests" not addressed to the Commission's Public Reference Section, nor "clearly and prominently identified * * * as [a] Freedom of Information Act Request,'" the correspondence nowhere even referred to the Freedom of Information Act; 10/ nor did the request identify what particular records were being requested. 11/ Likewise, the plaintiff Marshall in his letter of May 11, 1977, failed to indicate either any intention to have his first letter treated as a request under the FOIA or to appeal the denial of access to documents as required

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10/ See Complaint ¶¶27 and 34. The plaintiff Marshall's ambiguous reference to "the Sunshine Laws" in his first letter (see id. at ¶27) can only be construed to refer to the Government in the Sunshine Act, Pub. L. 94-409 (Sept. 3, 1976), codified at 5 U.S.C. 552b, which, although declaring "the policy * * * that the public is entitled to the fullest practicable information regarding the decisionmaking process of the federal government," relates to the conduct of agency meetings, and not the disclosure of documents.

11/ Rather than being a request for access to any particular records, Mr. Marshall's letter would appear to be more reasonably interpreted as a request that the Commission promptly conclude, and compile and issue a final report on, its pending investigation. Mr. Marshall's reference, in his correspondence, to a Commission "report," can only be construed as a request for a copy of a final report of investigation if and when issued. Mr. Marshall, until this suit was instituted, never indicated any interest in having access to the entire contents of records contained therein, except for a final report of investigation. Accordingly, at most, the plaintiffs can sue only to compel production of such final "report"—a record that did not exist when the request was made (as Mr. Pitt's reply clearly indicated), and does not exist now.

by the Act and the Commission rules. 12/

The Commission does not insist on formalistic compliance with its rules relating to requests made pursuant to the FOIA; so long as a person can be understood to be seeking access to some specific record or records, rather than making a generalized inquiry such as was made by Mr. Marshall, the request will not be rejected merely because it fails to invoke the FOIA, or was directed to the wrong office of the Commission. But, a cognizable request for specified records must be presented; this the plaintiffs herein failed to do. Accordingly, the plaintiffs in this action are "bound by the general rule requiring exhaustion of administrative remedies when Congress

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12/ See 5 U.S.C. 552(a)(3)(B) and 552(a)(6). The Commission's rules, set forth at 17 CFR 200.80(d)(6) require, inter alia, that:

> "Any person who has been notified * * * that his request for inspection of a record or for a copy has been denied, or who has received no response to a request for a record or copy within ten days * * * after his request was received by the Commission's staff, may appeal the adverse determination or the failure to respond by applying for an order of the Commission determining and directing that the record be made available.
>
> "The application shall be in writing, shall be clearly and prominently identified on the envelope or other cover and at the top of the first page by a legend such as 'Freedom of Information Act Appeal,' and shall identify the record in the form in which it originally requested.
>
> "The application should be delivered to the Office of the Freedom of Information Act Officer or sent by mail to the Securities and Exchange Commission, Public Information Officer, Washington, D.C. 20549."

has clearly provided an administrative procedure which is capable of resolving the controversy in question." Marrone v. U.S. Immigration and Naturalization Service, 500 F.2d 418, 420 (C.A. 2, 1974). Application of this rule in this instance requires the dismissal of the suit, since "[b]oth the FOIA * * * and the [agency's rules] provide an orderly and swift agency procedure for review of FOIA requests." Santa Belarus, Inc. v. National Labor Relations Board, 409 F. Supp. 271, 273 (E.D. Wisc., 1976) (citations omitted). 13/

The strict time limits placed on federal agencies by the FOIA require that a request under the Act at least be presented to an agency in an identifiable form. The FOIA provides that agencies shall make an initial determination of a request within ten working days of receipt and a determination of a subsequent appeal within 20 working days of receipt, 5 U.S.C. 552(a)(6)(A), subject to certain permissible extensions of the time in which the agency must respond, 5 U.S.C. 552(a)(6)(B). And, "[a]ny person making a request to any agency for records under paragraph * * * (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such

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13/ In Tuchinsky v. Selective Service System, 418 F.2d 155, 158 (C.A. 7, 1969), the court required compliance with agency regulations requiring a person initially to request certain information from appropriate local selective service boards—a requirement far more burdensome than any imposed by the Commission's regulations involved herein. Holding that only through exhaustion of administrative remedies is the judicial process available for suit, the court noted that "[t]he exhaustion of remedy rule is not satisfied by leapfrogging over any substantive step in the administrative process." Yet here, the plaintiffs have attempted to "leapfrog" the administrative process in its entirety, by refusing to present, to the agency, any cognizable request for specific records under the Act.

request if the agency fails to comply with the applicable time limit provisions of this paragraph." 5 U.S.C. 552(a)(6)(C).

In this regard, the plaintiffs must have first made a proper request to an agency, reasonably describing the records sought, and otherwise in substantial conformance with applicable agency rules. Otherwise, FOIA suits will come to the courts, like this one, without the agency ever having had an opportunity to consider whether the Act requires disclosure of any records sought by the plaintiff. It is undoubtedly for this reason that the District Court for the District of Columbia Circuit has stated: "Although plaintiffs claim that the Freedom of Information Act * * * confers jurisdiction on this Court, that Act requires that plaintiffs make specific requests in accord with published agency procedures." Aviation Consumer Action Project v. Civil Aeronautics Board, 370 F. Supp. 945, 947 (D. D.C., 1972) (emphasis supplied) (citations omitted). See also Jaffess v. Secretary, Dept. of Health, Education and Welfare, 393 F. Supp. 626, 629 (S.D. N.Y., 1975).

As this Court has held, mere requests for information or unspecified documents, such as the request made by the plaintiffs herein, "do not constitute exhaustion of remedies under the [Freedom of Information] Act." Morpurgo v. Board of Higher Education, 423 F. Supp. 704, 714 n. 26 (S.D. N.Y., 1976). Judicial intervention is premature until the plaintiffs have pursued and exhausted the agency's appeal procedures. See Santa Belarus, Inc. v. National Labor Relations Board, supra, 409 F. Supp. at 273.

In this action, the complaint sets forth the "requests" made to the Commission by the plaintiffs. That correspondence clearly evidences: (1) their complete failure to identify adequately any specific records to which access was desired; (2) their complete failure to comply with the published procedures of the Commission for submitting requests for records under the Freedom of Information Act; and (3) their complete failure to comply with the published procedures of the Commission for pursuing an appeal from an initial adverse determination. The plaintiffs, at least one of whom appears to be a member of the bar of this Court and another who aspires to the highest office of this Nation's largest city, cannot be excused from compliance with the most rudimentary of administrative procedures. In their failure to observe the basic requirements of the Freedom of Information Act and the Commission's rules, the plaintiffs are seeking an order from this Court to compel production of documents without ever having afforded the Commission, qua Commission, an opportunity to consider their request. 14/

II. THIS ACTION IS FRIVOLOUS AND WAS INSTITUTED IN BAD FAITH; THE COURT SHOULD AWARD THE COMMISSION ITS COSTS IN DEFENDING THE ACTION, INCLUDING REASONABLE ATTORNEY'S FEES.

As we have noted, the plaintiffs herein are not unsophisticated laymen, whose failure to follow clearly prescribed administrative procedures before resorting to the Court should be excused. Rather, a more reasonable explanation

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14/ In this Memorandum, the Commission has not addressed the issue of whether any of the exemptions from compelled disclosure contained in the FOIA might be applicable to such records as the plaintiff should subsequently identify and request access. Of course, the fact that the investigation in question is, as Mr. Pitt indicated, an active law enforcement matter, compels the conclusion that one or more of the FOIA's exemptive provisions are available if the Commission chooses to assert them. See Title Guarantee Co. v. National Labor Relations Board, 534 F.2d 484 (C.A. 2, 1976).

of the plaintiffs' conduct in this matter is that they are attempting to use the processes of this Court, as they have used the Commission, for the purpose of obtaining publicity to further a local political campaign. 15/ Although the general American rule is that, in the absence of specific statutory authority for the award of fees, each party to a litigation bears his own attorney's fees, "it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly or for oppressive reasons.'" Hall v. Cole, 412 U.S. 1, 5 (1973); accord, Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-259 (1975).

The "bad faith" test enunciated by the Supreme Court is satisfied where a party knowingly asserts a frivolous claim of defense. See, e.g., Carter v. Noble, 526 F.2d 677, 678-679 (C.A. 5, 1976). By any reasonable criterion, this premature action is patently frivolous and was instituted in bad faith; accordingly, the Court should, in ordering the dismissal of this action, award the Commission the costs of defending this action, including reasonable attorney's fees.

15/ After Mr. Pitt's initial response, the plaintiffs issued a press release on behalf of the candidacy of Mr. Harnett which seriously distorted Mr. Pitt's letter of May 6, 1977 (see supra, p. 3), in several respects. See Complaint ¶35. Having attempted to involve the Commission and its officials in this local political campaign, the plaintiffs now appear determined to do the same thing with this Court.

CONCLUSION

The plaintiffs have failed either to pursue or to exhaust their administrative remedies under the Freedom of Information Act and the Commission's rules thereunder. The complaint should therefore be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure since this Court lacks jurisdiction over the subject matter under the Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), and because the plaintiffs have failed to state a claim upon which relief can be granted.

The Court should further find that the action is frivolous and was instituted in bad faith, and should award the Commission its costs of defending the action, including reasonable attorney's fees.

Respectfully submitted,

Paul Gonson

PAUL GONSON
Associate General Counsel

Schropp

JAMES H. SCHROPP
Special Counsel

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Attorney

Securities and Exchanges Commission
Washington, D.C. 20549
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WILLIAM D. MORAN
Regional Administrator
Securities and Exchange
Commission
New York Regional Office
26 Federal Plaza
New York, New York 10007
Telephone (212) 264-1636

Dated: Washington, D.C.
July 21, 1977

GORDON MARSHALL, an attorney admitted to practice law under the laws of the State of N.Y. and in this court under the penalties of perjury affirm ~~under~~ that under Rule 65 B:

1. On July 21, 1977 I notified MRS. NAOMI BUCHWALD asst civil chief of the U.S. attorney of this application and she stated ass't U.S. Attorney Dollinger would want to be heard in opposition on behalf of the Executive Office.

2. On July 21, 1977 I notified MR. Harvey Pitt chief Counsel of the S.E.C. of this application & he stated he wanted to be heard in opposition on behalf of The S.E.C.

No previous application for the relief requested herein has been made to any court or judge.

Dated: N.Y. NY
July 21, 1977

Gordon Marshall

GORDON MARSHALL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs, 77 Civ 3110

-against- VJB

SECURITIES AND EXCHANGE COMMISSION
and EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

Defendants.

- -X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

JOEL HARNETT, being duly sworn, deposes and says:

1. I am one of the plaintiffs in the above entitled action.

2. This action was instituted by filing the original summons and complaint in the United States District Court for the Southern District of New York on June 27,1977 and on that day delivering sufficient copies of the summons and complaint to the

the office of the United States Marshal for service upon the named defendants.

3. Upon information and belief the United States Marsha effectuated service on June 30,1977 upon the EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, the ATTORNEY GENERAL OF THE UNITED STATES and the UNITED STATES ATTORNEY.

4. Apparently the United States Marshal's office inadvertently failed to serve the SECURITIES AND EXCHANGE COMMISSION (hereinafter referred to "SEC"). When my attorney, GORDON MARSHAL discovered this situation on July 15,1977, he went to the office of Mr. WILLIAM D. MORAN, the Regional Director of the SEC and Mr. MORAN immediately telephoned Mr. HARVEY PITT, General Counsel to the SEC in Washington. Mr. PITT agreed to accept service of the summons and complaint on July 15,1977 from the United States Marsh and to deem such service as having been made on June 30,1977 especially in view of the fact that Mr. MORAN had forwarded to Mr. PITT approximately two weeks earlier a copy of the summons and complaint as filed in this Court.

5. A letter from my attorney to Mr. PITT confirming the above arrangement is annexed hereto, made a part hereof and marked EXHIBIT "A".

Since the complaint has been filed in this Court and served upon all of the parties and other agencies of government required to be served, the provisions of Title 5 USCA, Section 552, subdivision (4)(B) granting this Court immediate jurisdiction to grant the relief requested herein become immediately applicable. Accordingly, I incorporate the complaint by reference and incorporate the allegations contained in said complaint in support of this motion.

6. I have brought this action under the Freedom of Information Act to obtain the assistance of this Court to effectuate the immediate release and dissemination to the public of the SEC Report as to the financial situation of the City of New York and most especially with respect to the sale of municipal securities and the culpability, if any, of any of the public officials, banks, members of the securities industry, brokers or others with respect to the disclosure or non-disclosure of pertinent information to the

public with respect to the sale of securities, with respect to the issuance or concealment of materially pertinent financial data with respect to the City's ability to pay and, inter alia, with respect to the sale by insiders and others of securities to the public with inside information as to the City's dire financial predicament without disclosure of such true facts to the unwary public.

7. It is public knowledge that the SEC has made its investigation and it is also public knowledge that the SEC has completed its investigation.

8. Indeed, the press and other media are now speculating as to the facts and conclusions contained in the SEC Report as well as with respect to when or whether the SEC Report will be released to the public.

9. Annexed hereto, made a part hereof and marked EXHIBIT "B" is a copy of an article published in the New York Times on July 16,1977 written by Martin Tolchin.

10. The New York times article acknowledges that the SEC Report has been completed and has been delivered to Washington.

11. The New York Times story also demonstrates that the SEC may have already decided not to release the Report prior to September 8, 1977.

12. The Primary Election with respect to the candidates for party designation for Mayor is scheduled to take place on September 8, 1977.

13. The New York Times article (EXHIBIT "B") further speculates as to the identity of the office holders and others who may be hurt by the SEC Report speculating, quite frankly, that the Report may be withheld by the SEC until after September 8, 1977 in order to protect Mayor Beame, who was an early political supporter of the President of the United States.

14. I have no personal knowledge as to whether there is any arrangement or understanding for the delay in the disclosure of the SEC Report to the public.

15. I am interested, however, in taking every step necessary to insure the release of the Report prior to the Primary Election so that whatever facts have been gathered at public expense by the SEC are disclosed to the electorate prior to the Primary Election so that the electorate may exercise their citizen's franchise and privilege in voting for candidates for public office with intelligence and with a full grasp of the relevant facts.

16. The paramount concern of this Court should be the protection of the public interest as well as the rights of individuals.

17. There is no doubt that the SEC Report will be released at some point. If the SEC Report is critical of former or present office holders, or banks, or securities analysts or brokers or others involved in the finances of the City of New York or the sale of its securities, such facts will come out. There is no underlying guarantee to anyone named in the SEC Report not to be publicly named nor for the findings of the SEC in connection with any individual or concern or business to be locked up forever from public scrutiny.

18. In view of the certainty that the facts must come out, and in view of the importance of the Primary Election as probably the most single election ever to take place in the City of New York, the overriding public interest should be to inform the public as to the results of the SEC investigation.

19. This Court is as aware as I that an informed public is a strong public and that citizens who are informed usually make the best decisions as to whom the reins of government and the business of government should be entrusted. A weak government is the result of uninformed citizens.

20. I have brought this action to prevent a few bureaucrats in Washington who may be politically motivated from manipulating and affecting the results of the Primary Election in New York by unilaterally deciding to withhold the SEC Report from the public prior to the selection by the citizens of the City of New York of candidates for Mayor of the City of New York.

21. On July 19, 1977, the New York Times published a further article on this subject matter quoting other candidates for the office of Mayor as demanding the release of the SEC

Report, one candidate charging "I think the fix is in". A copy of said article is annexed hereto, made a part hereof and marked EXHIBIT "C".

22. I frankly do not know whether there is any actual "fix" or whether officials in the SEC desire to withhold the Report because theybelieve correctly or incorrectly that the President would be pleased if they do so, or whether or not there is any other purpose behind the obviously deliberate leaks to the press from within the SEC that the Report will not be released until after the Primary Election.

23. However, whether or not there is an actual cover up, the failure to immediately release the Report has the same effect as a cover up.

24. Certainly the speculation in the press as to whether or not "a fix is in" and as to who, if anyone, is named in the Report, is more damaging to the innocent than the actual disclosure of the Report conducted by the SEC pursuant to law and in accordance with lawful procedures.

25. To permit the SEC to delay the release of a Report which has already been completed is to permit the Federal Government through the SEC to manipulate the knowledge of the electorate of the people of the City of New York and thereby to manipulate the results of the Primary and therefore the General Election.

26. We in the City of New York do not want another Watergate. We in the City of New York do not want to be in a position of having to impeach someone who may be elected to public office when possible information as to their unfitness to serve in public office may be disclosed after the election although such information should have been available to the public before the election.

37. There is speculation which has been expressed to me that under the Freedom of Information Act the SEC could use up all of the time remaining between now and the Primary Election to prevent the issuance of the Report by making dilatory motions and by exhausting the appeals process on the assumption that this Court might rule against the SEC delay and

in support of the public's right to know.

28. It is therefore because of the paramount public interest and the public's right to know the facts, findings and conclusions of the SEC report that I make this application by order to show cause for the relief hereinafter enumerated.

29. EXHIBIT "B" further demonstrates tha the SEC is contemplating writing an expurgaged or censored version of the Report. I believe that the morality of government in the United States and in the City of New York has progressed beyond the point where the people of the City of New York in exercising their right to vote should be subjected to edited versions of the SEC Report any more than it was morally right for the people of the United States to have to contend with 18 minute gaps and other deletions in the Nixon tapes.

30. We want no 18 minute nor 30 second gaps in the Report of the SEC as it was delivered by the New York Regional Office to the Home Office in Washington.

31. Title 5, United States Code Annotated, Section 552 provides in paragraph (4)(B) as follows:

> "*On complaint*, the *district court* of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records *and to order the production* of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, *and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth* in subsection (b) of this section, *and the burden is on the agency to sustain its action.*"
> (Emphasis added)

32. None of the exemptions set forth in the Freedom of Information Act are available to the SEC and it is my belief that neither the SEC nor the EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES can meet its statutory burden proscribed by Congress to sustain the continued secrecy and withholding of the SEC Report.

33. I make this application by order to show cause to request that this Court exercise the power granted to it by Congress as above set forth, to immediately (a) order the production of the entire SEC Report and that such Report be delivered to this

Court in Chambers and that such Report be immediately reviewed by this Court in camera as proscribed by Congress and that this Court, after examining the contents, (b) issue an immediate order directing the immediate release of such Report except for such parts as may be deemed by this Court to be covered by the exemptio subsections of the Freedom of Information Act.

34. I make this application by order to show cause in advance of July 30, 1977, the time when the SEC and EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES are required to interpose an answer, in view of the obviously planned leaks to the press by persons within the SEC as to the content and release date of the SEC Report.

35. I am one of the candidates for the Democratic Party designation for the office of Mayor of the City of New York and I bring this action because I believe that it is the most forthright thing to do with the knowledge that this Honorable Court will, independent of any influence, protect the right of the citizenry to be informed.

36. The only way to end damaging speculation as to the integrity of the SEC and as to whether any officials of the SEC or any other defendant in this case is attempting to manipulate the results of the Primary Election by withholding the Report is to immediately take such information out of their hands and to release that Report to the public.

37. The speculation reported in the New York Times, if true, represents a public be damned attitude which should not be condonedby this Honorable Court.

38. I am mindful of the need to protect the innocent. I am convinced that a Report by the SEC conducted in accordance with lawful procedures and safeguards has accomplished such protection. It of course would be understood that an unfavorable reference in the SEC Report to any individual or office holder or concern is not an indictment or a conviction, but is no more than it purports to be,namely, a finding of fact and conclusion by an agency empowered by Congress to make such findings of fact and conclusionsfor the public knowledge and for the knowledge of the legislators representing the public.

39. Accordingly, I respectfully pray that this Honorable Court immediately order that the defendants deliver the entire SEC Report to this Court for examination in camera and that this Court then order the immediate release of the entire Report to the public under the Freedom of Information Act.

40. I make this application by order to show cause because time is of the essence, a scant few weeks remaining before the Primary Election on September 8, 1977.

WHEREFORE, I respectfully pray that the instant motion be granted in its entirety.

Sworn to before me this
21st day of July, 1977

S/
JOEL HARNETT

S/

FAY D. STEINBERG
Notary Public. State of New York
No. 31-3823193
Qualified in New York County
Commission Expires March 30, 1978

GORDON MARSHALL
ATTORNEY AT LAW

60 EAST 42ND STREET
NEW YORK, N.Y. 10017
AREA CODE 212
661-1640
CABLE ADDRESS:
COMARSHALL NEW YORK

July 18,1977

Harvey L. Pitt, Esq.
General Counsel
Securities and Exchange Commission
Washington, D. C. 20549

Re: Joel Harnett and Save Our City, Inc.
vs. Securities and Exchange Commission, et ano

Dear Mr. Pitt:

This will confirm our agreement made on July 15, 1977 during the telephone conversation you had with Mr. Moran when I was in his office that you would deem the Securities and Exchange Commission served with the summons and complaint in the above matter as of June 30,1977.

Apparently the United States Marshal's office in New York City served the Executive Office of the President, the United States Attorney and the Attorney General on June 30,1977 and inexplicably failed to serve the Securities and Exchange Commission. The United States Marshal did deliver a copy of the suit papers to Mr. Moran on June 15,1977 and I understand that Mr. Moran had previously forwarded to you soon after the lawsuit was commenced a complete copy of the summons and complaint made from the original filed in the United States District Court for the Southern District of New York.

I appreciate your cooperate and look forward to receiving the answer of the Securities and Exchange Commission on or before July 30,1977.

Cordially yours,

gm/fds

BEST COPY AVAILABLE

CC; Mr. William D. Moran

EXHIBIT A

0054

U.S. to Hold New York Fiscal Data Until After the Primary Election

By MARTIN TOLCHIN

Special to The New York Times

WASHINGTON, July 15—Officials of the Securities and Exchange Commission, indicating they were aware that the agency's forthcoming report on New York City's fiscal crisis could affect the mayoral primary and damage Mayor Beame's re-election campaign, do not plan to issue the report until after the Sept. 9 primary.

Advance reports have indicated that the draft S.E.C. report issued by the commission's New York City office is severely critical of Mayor Beame and Comptroller Harrison J. Goldin, as well as one of the major New York City banks. The investigation sought to determine whether fraud was perpetrated or agency regulations violated in the actions leading up the the city's fiscal crisis.

Harold M. Williams, chairman of the agency, acknowledged in an interview that "we are sensitive to the timing of the issuance of the report, depending on its content—it might have political overtones."

He denied, however, that a decision had been made to delay publication beyond Sept. 9, and added, in response to a question, "There has been no contact from the White House on this thing, no effort and no inquiry concerning the timing or content of the report."

"I can assure you that we won't delay by one day the publication of the report," Mr. Williams added.

Inquiry Begun in January 1978

The commission formally received today a draft report prepared by the agency's New York City office, which began its investigation in January 1976. A commitment to publish the report "by the end of this summer" was made last spring by Mr. Williams. If no one candidate gets 40 percent of the vote in the primary, a runoff will be held Sept. 19 between the two top vote getters. Summer ends Sept. 23.

Mr. Williams was appointed by President Carter, who has publicly acknowledged his political debt to Mayor Beame, the first big-city mayor and major Northeastern political figure to support Mr. Carter's Presidential campaign.

Mr. Williams said it would take several weeks for the agency's technicians to study the report and make certain that there were no gaps or unanswered questions. The senior staff would then recommend action to the commission, which would then meet to deliberate and take final action.

Representative William S. Moorhead, Democrat of Pennsylvania and chairman of the Economic Stabilization Subcommittee of the House Banking Committee, said Mr. Williams had told him today that the earliest the commission could complete the review would probably be shortly before the primary. He said Mr. Williams also told him that the agency feared that publication of the report shortly before the primary date could unduly influence the campaign.

'Report Could Be Magnified'

The publication would therefore be delayed until after the primary, in the interest of fairness, Mr. Williams said, according to Mr. Moorhead, and a factual report, that did not make judgments, might be issued in its place. Mr. Williams said, however, that Mr. Moorhead may have misunderstood him.

"Williams is aware that with the political heat, the report could be magnified beyond what it should be," Mr. Moorhead said today, after a discussion with Mr. Williams.

He added, however, that "we did talk about the possibility of issuing just a factual report," a recitation of the chronology of the fiscal crisis, without making any judgments. "This ~~is possible~~ before the primary date," Mr. Moorhead added.

Although Mr. Williams insists that the Washington office has not yet seen the report, Mr. Moorhead said. "I can't believe that there haven't been discussions between New York and Washington on this."

'Proves We're Apolitical'

This is supported by a conversation with Wallace L. Timmeny, the agency's associate director of enforcement, reported by Elinor Bachrach, an aide to the Senate Banking Committee. Miss Bachrach reported that, like Mr. Williams, Mr. Timmeny insisted that the agency was nonpolitical, and said, "If we come out before the primary, we'll be accused of hurting the Mayor; if we come out after the primary, we'll be accused of helping the Mayor."

"That proves we're apolitical," Mr. Timmeny said, according to Miss Bachrach. Mr. Timmeny did not return several telephone calls.

According to Commissioner Williams, delays in the preparation of the report could not have been avoided.

"We've had staff turnover," he said. "Pieces of the report have been delayed beyond our control."

He said that Mr. Moorhead was correct regarding the factual summary. "One of the first pieces will be a factual summary," Mr. Williams said.

In his letter to Senator Proxmire, Mr. Williams promised tha tthe Banking Committee "will be given access to all supporting materials gathered by the commission in the course of the investigation, consistent with our responsibilities to pursue any appropriate enforcement action."

Congressional Reaction Seen

"Naturally," Mr. Williams wrote, "if any enforcement action should be instituted, difficulties may arise pertaining to the timing of such access, but you have my assurance that we will work closely with the committee and its staff to assist you in our important oversight and legislative functions."

The commission's report will undoubtedly receive intensive Congressional scrutiny by the Banking Committees of both the House and Senate.

A report by the Banking Committee of the New York State Assembly found that "it now appears that the city's major banks quietly and quickly divested themselves of New York City municipal notes and bonds. . .after privately learning of the depth and seriousness of the city's worsening fiscal crisis and failed to disclose this fiscal information to the new purchasers."

EXHIBIT B

TUESDAY, JULY 19, 1977

Lag on City Report Is Charged to S.E.C. By Koch and Badillo

By MARTIN TOLCHIN

Special to The New York Times

WASHINGTON, July 18—Two candidates for the Democratic nomination for Mayor of New York City today called for the immediate publication of a report by the Securities and Exchange Commission on the city's fiscal difficulties, which they said the panel had delayed in an effort to help Mayor Beame.

"There's no question that they're holding it up to protect him," said Representative Edward L. Koch of Manhattan. "That's the conclusion of everybody you talk to, whether they're for him or not for him."

Mr. Koch sent a letter to the Mayor asking him to "take the S.E.C. 'off the hook' by requesting the report be immediately released."

Similarly, Representative Herman Badillo of the Bronx sent a letter to the commission asking that the report be released.

"I think the fix is in," Mr. Badillo said in an interview. "There's no question that they're trying to protect Beame. Nobody in Washington can understand why this report is not available."

The final installment of the draft report issued by the New York City office was received by the S.E.C. last Friday. Agency officials, indicating that they were aware that the report could affect the mayoral primary and damage Mayor Beame's re-election campaign, do not plan to issue this report until after the Sept. 9 primary, Congressional sources said last week.

Advance reports have indicated that the draft S.E.C. report, issued by the New York City office, is severely critical of Mayor Beame, Comptroller Harrison J. Goldin and one of the major New York City Banks. The investigation sought to determine whether fraud was perpetuated and the agency regulations violated in the actions leading up to the city's fiscal crisis.

Harold M. Williams, chairman of the S.E.C., said on Friday: "We are sensitive to the timing of the issuance of the report, depending on its content. It might have political overtones."

But he denied that decision had been made to delay publication beyond Sept. 9. He said, in a response to a question, that "there has been no contact from the White House on this thing."

Mr. Williams was appointed by President Carter, who has publicly acknowledged his debt to Mayor Beame, the first big-city mayor and major Northeast political figure to support the Carter Presidential campaign.

In his letter to the Mayor, Mr. Koch wrote, "I'm sure that you did not ask that the report be withheld."

"But since it is being withheld, you are the only one, as Mayor of the city, who can take the S.E.C. 'off the hook' by requesting that the report be immediately released," he continued. "If the report exculpates the city administration from any blame, you get the credit. If the city administration is criticized, then the people of the city surely are entitled to know that before the September primary."

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs,

-against-

SECURITIES AND EXCHANGE COMMISSION
and EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

Defendants.

- X

77 Civ 3110 VLB

ORDER TO SHOW CAUSE

~~WITH TEMPORARY RESTRAINING ORDER~~

Upon reading the annexed AFFIRMATION OF GORDON MARSHALL AND THE affidavit of JOEL HARNETT, sworn to the 21st day of July, 1977, and the exhibits annexed thereto, ~~let~~ IT IS HEREBY ORDERED, THAT the defendants show cause before this Court in the Chambers of Hon. Vincent L. Broderick, Room 318, at the Courthouse, Foley Square, on Tuesday the 26 day of July, 1977 at 10 o'clock in the forenoon noon of said day, why an order should not be made pursuant to Title 5, United States Code Annotated, Section 552, ordering that the Report of the SECURITIE AND EXCHANGE COMMISSION (including but not limited to the Report of the New York Regional Office of the SECURITIES AND EXCHANGE

COMMISSION) be produced and delivered to this Court for examination by this Court in camera to enable this Court to determine whether such Report or any part thereof should be withheld under any of the exemptions set forth in subsection (b) of Section 552 relating to exemptions, and to order the immediate release of all of the SECURITIES AND EXCHANGE COMMISSION Report which is not exempt, and it is

ORDERED that either or both of the defendants having possession of the complete SECURITIES AND EXCHANGE COMMISSION Report relating to the sale of municipal bonds and securities of the City of New York and the finances of the City of New York and all of the transactions relating thereto bring ~~deliver~~ said Report to this Court on the return date of this motion for the purposes set forth in Section 552 ~~and, pending the hearing and determination of this motion, the defendants be and they hereby are~~ ~~[illegible]~~ ~~enjoined from deleting, modifying, rewriting or changing in any way the Report as delivered to the SECURITIES AND EXCHANGE COMMISSION in Washington by the New York Regional Office of said Commission.~~ , AND IT IS

FURTHER ORDERED,

THAT Sufficient reason appearing therefor, let PERSONAL service of this order to show cause and the affidavit and exhibits upon which it is based be deemed sufficient if served upon the SECURITIES AND EXCHANGE COMMISSION, THE EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, THE UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF NEW YORK and BY CERTIFIED MAIL, RETURN REC. REQUESTED the ATTORNEY GENERAL OF THE UNITED STATES on or before the 26 day of July, 1977, provide that each is notified by telephone of the contents of this order on July 22, 1977 and copies hereof are personally served on the U.S. Attorney, Southern District of New York and on the office of the Regional Administrator of the Securities and Exchange Commission in New York City by 5 P.M. on July 22, 1977.

Dated, New York, New York
July 22, 1977
~~o'clock~~
~~M~~

S/ VINCENT L. BRODERICK
U.S.D.J.

ISSUED AT
9:45 A.M.

GORDON MARSHALL, an attorney admitted to practice law under the laws of the State of N.Y. and in this court under the penalties of perjury affirm ~~[illegible]~~ that under Rule 65 B:

1. On July 21, 1977 I notified MRS. NAOMI BUCHWALD asst civil chief of the U.S. attorney of this application and she stated ass't U.S. Attorney Dollinger would want to be heard in opposition on behalf of the Executive Office-

2. On July 21, 1977 I notified MR. Harvey Pitt chief counsel of the S.E.C. of this application & he stated he wanted to be heard in opposition on behalf of the S.E.C.

No previous application for the relief requested herein has been made to any court or judge.

Dated: N.Y. NY
July 21, 1977

Gordon Marshall

GORDON MARSHALL

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, *et al.*,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, *et al.*,

Defendants.

77 Civ. 3110 (VLB)

MOTION OF THE DEFENDANT, SECURITIES AND EXCHANGE COMMISSION: (1) TO STRIKE PORTION OF ORDER TO SHOW CAUSE, ISSUED JULY 22, 1977, WHICH DIRECTS THE COMMISSION TO BRING TO COURT ON RETURN DAY THE COMPLETE REPORT OF INVESTIGATION IN THE MATTER OF THE CITY OF NEW YORK; AND (2) TO SET FOR HEARING THE MOTION BY THE COMMISSION TO DISMISS THIS ACTION

HARVEY L. PITT
General Counsel

PAUL GONSON
Associate General Counsel

JAMES H. SCHROPP
Special Counsel

JOHN P. SWEENEY
Attorney

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WILLIAM D. MORAN
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Copy Received
7/25/77.
10:50 AM
for plaintiffs

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, et al.,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants.

77 Civ. 3110 (VLB)

MOTION OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION: (1) TO STRIKE PORTION OF ORDER TO SHOW CAUSE, ISSUED JULY 22, 1977, WHICH DIRECTS THE COMMISSION TO BRING TO COURT ON RETURN DAY THE COMPLETE REPORT OF INVESTIGATION IN THE MATTER OF THE CITY OF NEW YORK; AND (2) TO SET FOR HEARING THE MOTION BY THE COMMISSION TO DISMISS THIS ACTION

The Securities and Exchange Commission (the "Commission"), a defendant herein, respectfully represents as follows:

1. In this action, under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552, the plaintiffs seek access to all records contained in the file relating to the Commission's investigation in the matter of the City of New York. 1/ On July 22, 1977, the Commission served and filed a motion to dismiss the complaint since the plaintiffs have failed either to pursue or exhaust their administrative remedies under the Freedom of Information Act, and this Court accordingly lacks jurisdiction over the subject matter of the complaint and the plaintiffs have failed to state a claim upon which relief can be granted. Moreover, the Commission asserts that the action is frivolous and was instituted in bad faith, and thus the Court should award the Commission its costs of defending the action, including reasonable attorney fees.

2. On July 22, 1977, this Court, on application of the plaintiffs, issued an Order to Show Cause, directed to the Commission, returnable on

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1/ See Complaint, p. 19.

Tuesday, July 26, 1977, requiring the Commission, among other things, to produce for in camera inspection the "complete Securities and Exchange Commission report" of investigation.

3. Contrary to the Court's apparent understanding of the facts in issuing its order, 2/ the New York Regional Office of the Commission, which has been conducting an investigation in the matter of the City of New York, has not yet completed a report of the results of its investigation which that Office intends to present to the Commission, in Washington, D.C., for its consideration. As appears from the annexed affidavit of William D. Moran, Regional Administrator of the New York Regional Office, the staff is, at the present time, diligently working on that report. Accordingly, since the Commission is unable to bring the "complete * * * report," as ordered by the Court, the Commission seeks an order striking

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2/ The affidavit of Joel Harnett in support of his request that the Court issue its show-cause order is replete with numerous misstatements of fact. Thus, for example, Mr. Harnett would have this Court believe:

(1) that the Commission has completed its investigation in the matter of the City of New York (Aff. ¶7);

(2) that a report of investigation has been completed and has been sent to Washington (Aff. ¶10);

(3) that "a few bureaucrats" at the Commission "who may be politically motivated" may withhold, or time the release of, the report for political considerations, or may censor or expurgate the report (Aff. ¶¶13, 20, 22, 29-30).

Each of these representations is false. After recounting in his affidavit the incorrect speculations of others, and adding his own false speculations, Mr. Harnett concludes by stating that

> "the only way to end damaging speculations as to the integrity of the SEC and as to whether any officials of the SEC * * * is [sic] attempting to manipulate the results of the Primary Election by withholding the Report is to immediately take such information out of their hands and to release that Report to the public." (Aff. ¶36)

Mr. Harnett's conclusion, however, is as specious as the "facts" he brought before this Court in pursuading it to enter its Order to Show Cause.

that portion of the order to show cause which directs that such report be brought to Court. Moreover, to require the Commission to collect and bring to Court various and sundry draft material, in different stages of completion, would seriously disrupt the preparation of the report and would be extremely counterproductive to the ultimate rendering of a final report, the completion of which, presumably, the plaintiffs do not wish to obstruct. Finally, as indicated in more detail in our Response to the Order to Show Cause, p. 4, n.3 and p. 6, n.4, in camera inspection of the documents in question is inappropriate and unnecessary even if the Court were to consider the merits of the plaintiffs' claim to the records under the FOIA. Environmental Protection Agency v. Mink, 410 U.S. 73, 91-92 (1972); New England Medical Center Hospital v. National Labor Relations Board, 548 F.2d 377, 385 (C.A. 1, 1976); Safeway Stores, Inc. v. Federal Trade Commission, 428 F. Supp. 346, 347 (D. D.C., 1977).

5. The Commission's motion to dismiss the complaint should provide the basis for a complete disposition of this case. Accordingly, we request that that motion to dismiss, a copy of which was served on counsel for the plaintiffs before 5:00 p.m. on July 22, 1977, be considered by the Court at the same time as the Order to Show Cause — Tuesday, July 26, 1977, at 10:00 a.m.

WHEREFORE, the Commission respectfully prays that this Court (1) strike from its Order to Show Cause dated July 22, 1977, the following language:

> "And it is ORDERED that either or both of the defendants having possession of the complete Securities and Exchange Commission report relating to the sale of municipal bonds and securities of the City of New York and the finances of the City of New York and all the transactions relating thereto, bring said report to this Court on the return date of this motion for the purposes set forth in Section 552.";

and (2) that argument on the Commission's motion to dismiss this action be heard on Tuesday, July 26, 1977, at 10:00 a.m.

Respectfully submitted,

s/HLP
HARVEY L. PITT
General Counsel

s/PG
PAUL GONSON
Associate General Counsel

s/JHS
JAMES H. SCHROPP
Special Counsel

s/JPS
JOHN P. SWEENEY
Attorney

Securities and Exchange Commission
Washington, D.C. 20549
Telephone: (202) 755-1224 (Schropp)

WILLIAM D. MORAN
Regional Administrator
New York Regional Office
Securities and Exchange Commission
26 Federal Plaza
New York, New York 10007
Telephone: (212) 264-1636

Dated: Washington, D.C.
July 25, 1977

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, et al.,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants.

77 Civ. 3110 (VLB)

AFFIDAVIT

City of New York)
) ss:
State of New York)

WILLIAM D. MORAN, having been duly sworn, deposes and says:

1. I am the Regional Administrator of the New York Regional Office of the Securities and Exchange Commission. I make this affidavit on personal knowledge in support of the motion of the Commission to strike a portion of this Court's Order to Show Cause, issued July 22, 1977, which directs that the Commission produce, on the return day of that Order, the complete report of its investigation in the matter of the City of New York.

2. The investigation of the Securities and Exchange Commission in the matter of the City of New York is an active investigatory matter being conducted by personnel of the Commission's New York Regional Office acting under my direction and supervision. On my own personal knowledge, I unequivocally state that, contrary to the sworn statements made in the affidavit of Joel Harnett in support of the plaintiffs' application to this Court on July 22, 1977, for an Order to Show Cause, the New York Regional Office has, at the present time, not completed its investigation in the matter of the City of New York, and no complete report has been written or sent to the Commission in Washington, D.C.

3. Numerous staff members of my Office are, at the present time, actively engaged in the drafting of a report concerning this investigation,

to be submitted, when completed by this Office, to the Securities and Exchange Commission in Washington, D. C. for its consideration.

4. If this Office were required, at the present stage of the investigation, to deliver to the Court draft portions of the report in various stages of completion, the effect would most surely be highly disruptive to the work of this Office in attempting to complete a report to the Commission as promptly as possible.

S/WDM
WILLIAM D. MORAN

Subscribed and sworn to before
me this 2d day of July, 1977

S/ HW
Notary Public

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, *et al.*,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION,
et al.,

Defendants.

77 Civ. 3110 (VLB)

ORDER: (1) STRIKING THE PORTION OF THE ORDER TO SHOW CAUSE ISSUED JULY 22, 1977, WHICH DIRECTS THE COMMISSION TO BRING TO COURT ON THE RETURN DAY THEREOF THE COMPLETE REPORT OF INVESTIGATION IN THE MATTER OF THE CITY OF NEW YORK: AND (2) SETTING FOR HEARING THE MOTION BY THE COMMISSION TO DISMISS THIS ACTION

Upon consideration of the motion of the Securities and Exchange Commission and the affidavit of William D. Moran, Regional Administrator of the New York Regional Office of the Securities and Exchange Commission, and being fully advised in the premises, it is hereby

ORDERED that the following language contained in the Order to Show Cause entered herein on July 22, 1977, is striken:

> "And it is ORDERED that either or both of the defendants having possession of the complete Securities and Exchange Commission report relating to the sale of municipal bonds and securities of the City of New York and the finances of the City of New York and all the transactions relating thereto, bring said report to this Court on the return date of this motion for the purposes set forth in Section 552.";

AND IT IS FURTHER ORDERED that the motion of the Securities and Exchange Commission to dismiss the complaint herein be set for argument on July ~~22~~ 26, 1977, at 10:00 a.m., the plaintiffs having been served with said motion by 5:00 p.m. on July ~~25~~ 22, 1977, and having had an opportunity to respond thereto.

Dated: New York, New York
July __, 1977

VINCENT L. BRODERICK
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, *et al.*,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, *et al.*,

Defendants.

77 Civ. 3110 (VLB)

RESPONSE OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION TO THE ORDER TO SHOW CAUSE ENTERED BY THE COURT ON JULY 22, 1977

HARVEY L. PITT
General Counsel

JAMES H. SCHROPP
Special Counsel

JOHN P. SWEENEY
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Copy Received
7/25/77
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atty for plaintiffs

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, et al.,
Plaintiffs,
v.
SECURITIES AND EXCHANGE COMMISSION, et al.,
Defendants.

77 Civ. 3110 (VLB)

RESPONSE OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION TO THE ORDER TO SHOW CAUSE ENTERED BY THE COURT ON JULY 22, 1977

On July 22, 1977, this Court entered an order directing the Securities and Exchange Commission, a defendant herein, to show cause why an order should not be entered directing that "the report of the Securities and Exchange Commission, including but not limited to the report of the New York Regional Office of the Securities and Exchange Commission," be produced and delivered to the Court for *in camera* inspection to enable the Court to determine whether the report or any part thereof should be released pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552. The Commission was further ordered to bring to the Court on the return date of the order "the complete Securities and Exchange Commission report relating to the sale of municipal bonds and securities of the City of New York and the finances of the City of New York and all of the transactions relating thereto * * *."

The Commission responds herein to that part of the Court's order directing the Commission to show cause why Commission records should not be released pursuant to the FOIA. In a separate motion, filed this day, the Commission has moved for an order of the Court (1) striking that portion of the Court's show-cause order which directed the Commission to bring to Court a completed report of the investigation; and (2) setting for hearing, at the same time as the hearing on the show cause order, the Commission's motion to dismiss this action, filed with the Court on

July 22, 1977. As we have observed, we believe that the Commission's motion to dismiss the complaint should provide the basis for a complete disposition of this case. In the event, however, that the Court should proceed, as suggested in its show-cause order, to consider whether any Commission records should be released pursuant to the FOIA, the Commission respectfully brings the following points to the Court's attention.

1. Proceeding by Way of an Order to Show Cause is Inappropriate in the Circumstances of this Case.

The Freedom of Information Act provides that the defendant is permitted to "answer or otherwise plead" within 30 days after service of the complaint. 5 U.S.C. 552(a)(4)(C). Pursuant to this statutory provision, the Commission has filed a motion to dismiss the complaint herein. Orderly procedure requires that the pending motion to dismiss be considered first. If that motion is denied, in whole or in part, the Commission will then be required by the Rules of Civil Procedure to answer the complaint within ten days after notice of the Court's action. At that time, a consideration of the merits of the case, if any, would be appropriate.

By bringing on this matter by way of an order to show cause, in the absence of any justification therefor, the plaintiffs are attempting to deprive the defendants of their statutory right to have this matter decided in a fair and orderly manner. Government entities, however, no less than private citizens, are entitled to proceed in an orderly manner in conducting the defense of litigation. See, e.g., Martin v. Neushall, 396 F.2d 759 (C.A. 3, 1968). An order to show cause is not a satisfactory substitute for a trial on the merits; by choosing to proceed in this manner, the plaintiffs are acting in derogation of the right of the defendants to respond to the complaint in due course and to assist the Court in arriving at an informed determination on the merits.

Accordingly, the Commission respectfully requests that the Court vacate its order to show cause entered on July 22, 1977.

2. In any Event, Draft Material Relating to the New York City Investigation is Exempt From Compelled Production Under the Freedom of Information Act.

Should the Court wish to consider the merits of the plaintiffs' action at this time, it is in any event abundantly clear that they have no right to compel the Commission to produce draft material, or any material, relating to the Commission's ongoing investigation of New York City. As we have indicated, there is no "report" on the Commission's investigation. Bits and pieces of preliminary drafts of a "report" are in existence, and the staff is working diligently to complete its efforts. But, such draft materials as do exist are exempt by virtue of the FOIA exemptions for inter- and intra-agency memoranda, 5 U.S.C. 552(b)(5), and for investigatory records the disclosure of which would interfere with actual or potential law enforcement proceedings, 5 U.S.C. 552(b)(7)(A).

a. Exemption 5—Internal Memoranda

In enacting the Freedom of Information Act, Congress included an exemptive provision for inter-agency or intra-agency memoranda which is designed to meet the problems which would be created if internal communication within an agency were needlessly inhibited. 5 U.S.C. 552(b)(5). The legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that "confidential intra-agency advisory opinions * * * are privileged from inspection." Kaiser Aluminum & Chemical Corp. v. United States, 141 Ct. Cl. 38, 39, 157 F. Supp. 939, 946 (1958) (Reed, J.). As Mr. Justice Reed there stated:

> "There is a public policy in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action." Id. at 48, 157 F. Supp. at 946.

The importance of this underlying policy was echoed again and again during legislative analysis and discussions of Exemption 5. The House Report explains the exemption as follows:

> "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended,

> and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fish bowl.'" 1/

As the President further observed on signing the FOIA into law, "Officials within Government must be able to communicate with one another fully and frankly *without publicity*." 2/

As many courts, including the Supreme Court, have held, predecisional memoranda prepared in order to assist an agency decision maker in arriving at his decision are exempt from disclosure under the FOIA. *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975); *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Even in its eventual final form, the purpose of a report of the Commission's New York Regional Office to the Commission will be to assist the Commission in determining what, if any, response to make to the facts uncovered during the New York City investigation. In its present condition, the draft material that ultimately might, after appropriate modification, comprise parts of a final report, relate not only to recommendations that might eventually be made to the Commission, but to recommendations made, and expressions of views and opinions exchanged, among members of the staff of the New York Regional Office with respect to what form the report to the Commission should ultimately take. Such "deliberative materials" have always been held to be exempt from compelled disclosure. 3/

1/ H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 10 (1966). See also, S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

2/ Statement by President Johnson upon signing Pub. L. 84-487 on July 4, 1966, reprinted in Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967), p. ii (emphasis added).

3/ *See*, *e.g.*, *Aspin* v. *Department of Defense*, 348 F. Supp. 1081, 1082 (D. D.C., 1972), *affirmed*, 491 F.2d 24 (C.A. D.C., 1973); *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1348, 1358-1359 (C.A. 2, 1971); *Wu* v. *National Endowment for Humanity*, 460 F.2d 1030, 1034 (C.A. 5, 1972); *Ditlow* v. *Volpe*, 362 F. Supp. 1321, 1327 (D. D.C., 1973), *reversed on other grounds* *sub nom.* *Ditlow* v. *Brinegar*, 494 F.2d 1073 (C.A. D.C.), *certiorari denied*, 419 U.S. 974 (1974).

(footnote continued)

Although it is to be expected that the final report to the Commission, as well as the material now at various stages of preparation, will contain summaries of the evidence uncovered during the Commission's investigation, such materials are protected by Exemption 5, as well as the actual recommendations, expressions of opinions and similar matters. In Montrose Chemical Corp. v. Train, 491 F.2d 63 (C.A. D.C., 1974), the court held that a summary of evidence presented at public hearings was protected from disclosure by Exemption 5, since the summary had been prepared by staff members of the Environmental Protection Agency to assist the administrator of the agency in deciding whether to ban DDT. The court stated that the purpose of Exemption 5 was "to protect not simply deliberative material, but also the deliberative process of agencies," and that "[t]o probe the summaries of record evidence would be the same as probing the decision-making process itself." 491 F.2d at 68, 71. Just as was the case in Montrose, the "evaluation and selection of certain facts" by the staff of the Securities and Exchange Commission should not be disclosed in this case. Id. at 70. That is, however, what would necessarily occur as a result of any public disclosure of any portion of the draft material here in issue.

b. Exemption 7(A)—Investigatory Records

The records here in issue are also exempt from disclosure pursuant to the FOIA because they are investigatory records the disclosure of which

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3/ (continued)

In issue in Safeway Stores, Inc. v. Federal Trade Commission, 428 F. Supp. 346, 347 (D. D.C., 1977), a recent action arising under the FOIA, was a "170-page staff report culminating a non-public investigation of the retail food store industry," which had been "transmitted to the Commission and rejected." The agency's claim that the report was exempt pursuant to Exemption 5 was upheld, the court holding that an in camera inspection of the documents in question was unnecessary, since it was clear that the report was "involved in a predecisional deliberative process." Since reports to an agency by its staff are exempt from disclosure even after consideration of the completed report by the agency, a fortiori the draft material here in issue is similarly protected against such disclosure.

would interfere with a Commission investigatory proceeding. 5 U.S.C. 552(b)(7)(A). It is indeed difficult to conceive of any greater "interference" that could result from the disclosure of investigatory records than the interference that would be visited upon the Commission's investigation, if disclosure of the records in issue were to be required at this most critical time. At this stage, the primary work being conducted by the staff of the Commission involves the weighing and evaluation of the evidence collected during a lengthy investigation. Eventually, the Commission will have to consider the report of the New York Regional Office in order to determine what, if any, further action would appear to be required in the public interest and in the interest of investors in securities issued by the City of New York. To disrupt this sensitive process through the premature public release of any records relating to this investigation, even prior to the time that those records have been received and considered by the Commission itself, could only be viewed as an utterly irresponsible act.

As stated by the court in *New England Medical Center Hospital* v. *National Labor Relations Board*, 548 F.2d 377, 383 (C.A. 1, 1976):

> "Exemption 7(A) applies whenever disclosure would 'interfere' with an enforcement proceeding, and it is difficult to conceive of a greater interference than one which would involve the court in arbitrating the [agency's] control of what documents to retain and what documents to surrender immediately prior to an enforcement proceeding." *4/*

4/ Significantly, the court in *New England Medical Center*, in reaching its conclusion that the records in question were exempt pursuant to Exemption 7(A), held that an *in camera* inspection of those records was unnecessary. The court noted in this regard that

> "the FOIA is sufficiently flexible to accomodate the agency's interest in swift and effective enforcement proceedings by allowing it to withhold certain information temporarily without close judicial oversight."

548 F.2d at 385. The court's observation that *in camera* inspection is unnecessary when the records sought relate to an active investigation or enforcement proceeding is consistent with the Supreme

(footnote continued)

Accord, Title Guarantee Co. v. National Labor Relations Board, 534 F.2d 484 (C.A. 2), certiorari denied, 429 U.S. 834 (1976); Roger J. Au & Son, Inc. v. National Labor Relations Board, 538 F.2d 80 (C.A. 3, 1976); Goodfriend Western Corp. v. Fuchs, 535 F.2d 145 (C.A. 1), certiorari denied, 429 U.S. 895 (1976); Climax Molybdenum Co. v. National Labor Relations Board, 539 F.2d 63 (C.A. 10, 1976).

Although Exemption 7 was amended in 1974 in order to provide access to some records contained in investigatory files where no enforcement action was likely to result, the 1974 Amendments have no effect on the records here in issue. As the Court recognized in New England Medical Center, supra, 548 F.2d at 382,

> "there is solid evidence in the legislative history that the sponsors of the 1974 Amendments acknowledged the right of an investigatory agency to avoid the possible harm to a prospective law enforcement proceeding that might occur through 'premature release of evidence or information not in the possession of known or potential defendants.' 120 Cong. Rec. 17033 (remarks of Senator Hart)."

Accordingly, the court concluded that forcing the premature release of active investigatory records "would come within this recognized category of interference" by "threaten[ing] the agency's ability to prosecute cases with dispatch." 5/

4/ (continued)

Court's observation in Environmental Protection Agency v. Mink, 410 U.S. 73, 91-92 (1972), that a "flexible, common-sense approach" to the FOIA should be adopted, an approach that is not "unnecessarily rigid." The Court went on to indicate, in the context of an Exemption 5 issue, that affidavits or even "surrounding circumstances" could show that certain documents met the requisite criteria for exemption. Here, we submit that "surrounding circumstances" and the affidavit of William D. Moran more than adequately demonstrate that the records sought by the plaintiffs are exempt. In camera inspection is not required, and should not be unnecessarily imposed on the Commission.

5/ Accord, Title Guarantee, supra, 534 F.2d at 491, where the court identified as a source of interference stemming from premature disclosure of investigatory records the opportunity that would be afforded suspected violators to "frustrate the proceedings or construct defenses which would permit violations to go unremedied."

CONCLUSION

For the foregoing reasons, the Court should vacate its Order to Show Cause entered on July 22, 1977. The Court should initially consider the Commission's pending motion to dismiss, and should, for the reasons stated in the memorandum filed in support thereof, dismiss this action. If the Court does, nevertheless, proceed to consider the merits of the plaintiffs' claims under the FOIA to access to the draft materials in issue, the Court should find that the documents requested by the plaintiffs herein are exempt from compelled disclosure pursuant to Exemptions 5 and 7(A) of the Freedom of Information Act. This action should be dismissed, with costs and reasonable attorney's fees awarded to the Commission.

Respectfully submitted,

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Dated: July 25, 1977

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, *et al.*, Plaintiffs, v. SECURITIES AND EXCHANGE COMMISSION, *et al.*, Defendants.	77 Civ. 3110 (VLB)

SUPPLEMENTAL MEMORANDUM OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF ITS APPLICATION FOR COSTS AND ATTORNEY'S FEES

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UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, *et al.*,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION,
et al.,

Defendants.

77 Civ. 3110 (VLB)

SUPPLEMENTAL MEMORANDUM OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION IN SUPPORT OF ITS APPLICATION FOR COSTS AND ATTORNEY'S FEES

In its motion to dismiss this action for failure of the plaintiffs to pursue or exhaust their administrative remedies under the Freedom of Information Act, 5 U.S.C. 552, the Securities and Exchange Commission (the "Commission") requested this Court to award it the costs and reasonable attorney's fees incurred in defending the action, on the ground that the action had been brought "in bad faith, vexatiously, wantonly or for oppressive reasons." *Hall* v. *Cole*, 412 U.S. 1, 5 (1973); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 258-259 (1975). Since the Commission made its initial motion for attorney's fees, subsequent events relating to the conduct of this litigation by the plaintiffs have further strengthened the basis for the award of attorney's fees to the Commission under the applicable "bad faith" standard. This supplemental memorandum is submitted in order to apprise the Court of these subsequent developments.

1. The plaintiffs have proceeded inappropriately in bringing this matter on for hearing by way of an application for an order to show cause in the absence of any justification for this extraordinary procedure. [1]

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[1] It should also be noted that the plaintiffs' counsel gave no indication of his intention to proceed by way of an application for an Order to Show Cause on July 15, 1977, when the Commission agreed to counsel's request that it consider service to have been effected

(footnote continued)

In so doing, they have necessitated the expenditure of considerable time and effort, on the part of both the Court and the Commission. As set forth in our response to the Court's order to show cause, by choosing to proceed in this manner, the plaintiffs have acted in derogation of the right of the defendants to respond to the complaint in due course and to assist the Court in arriving at an informed determination on the merits. An order to show cause is not a satisfactory substitute for a trial on the merits, and should not be used in an attempt to defeat the right of the defendants to "answer or otherwise plead" within 30 days after service of the complaint. 5 U.S.C. 552(a)(4)(C). Pursuant to this statutory provision, the Commission has filed a motion to dismiss the complaint herein and, as we have indicated in our response to the order to show cause, orderly procedure requires that the pending motion to dismiss be considered first.

2. The plaintiffs' application to this Court for an order to show cause was supported by a sworn statement made in the affidavit of Joel Harnett, one of the plaintiffs herein, which not only improperly recounted the unfounded and unsupported speculation of other individuals, but added the unsupported speculation of the plaintiff himself, and was moreover replete with impertinent and unwarranted aspersions on the integrity of officials of the Securities and Exchange Commission. 2/ These inappro-

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1/ (continued)

on the Commission on June 30, 1977. Nor did counsel indicate that this was his intention on July 18, 1977, when this arrangement was confirmed in writing in a letter to the Commission's General Counsel, in which the plaintiffs' counsel stated: "I look forward to receiving the answer of the Securities and Exchange Commission on or before July 30, 1977." See Exhibit A to the affidavit of Joel Harnett, filed in support of plaintiffs' application for an order to show cause. The plaintiffs have not explained what change in circumstances occurring after July 18, 1977, warranted their application to this Court for an order to show cause.

2/ For example, paragraphs 9-24 of Mr. Harnett's affidavit are largely devoted to recounting speculation that appeared in two articles that were published in the New York Times on July 16, and July 19, 1977, and adding thereto his own speculation concerning these articles. These unwarranted assertions concerning the integrity

(footnote continued)

priate statements made in the Harnett affidavit provide further evidence that this litigation was instituted and has been conducted vexatiously and in bad faith.

3. This suit was instituted for obvious political reasons, and the plaintiffs are attempting to use this Court, as they have used the Commission, in order to obtain publicity that they hoped would benefit their ongoing political campaign. In these attempts, the plaintiffs have demonstrated their willingness to issue press releases that misstate and distort the facts, when it suits their purposes to do so. Attached hereto as Exhibit B is such a press release, issued by the plaintiffs on May 5, 1977, in which the substance of a telephone conversation between plaintiff Gordon Marshall and Harvey L. Pitt, General Counsel of the Commission, was materially misrepresented by the plaintiffs. The plaintiffs' attempt to bring this matter on for a court hearing by way of an inappropriate request for an order to show cause can only be viewed as another attempt to obtain publicity for their political campaign—an attempt which has, as we have noted, resulted in the expenditure of a significant amount of time and effort, on the part of both the Court and the Commission. These actions are further evidence that the plaintiffs have acted vexatiously and in bad faith.

2/ (continued)

of the Commission and its officials are completely unsupported and unsupportable. As stated in a letter from Harold M. Williams, Chairman of the Commission, to the editor of the New York Times, a copy of which is attached hereto as Exhibit A:

> "the truth is that the Commission has not made any * * * decision [to delay the issuance of the report] and will release the New York City report as soon as it is completed * * *. Our staff is continuing to work on what has been an extremely difficult and complicated investigation. The findings of the Commission will be released to Congress and to the public at the earliest possible time consistent with our responsibilities under the federal securities laws."

4. As we indicated in our memorandum in support of our motion to dismiss for failure to exhaust administrative remedies, the plaintiffs have completely failed to advance any substantial, colorable claim of access to any Commission documents under the Freedom of Information Act, 5 U.S.C. 552. As set forth in that memorandum, the documents brought before the Court by the plaintiffs themselves clearly evidence: (1) their complete failure to identify adequately any specific documents to which access is desired; (2) their complete failure to comply with published procedures of the Commission for submitting requests for records under the Freedom of Information Act; and (3) their complete failure to comply with the published procedures of the Commission for pursuing an appeal from an initial adverse determination. The plaintiffs' failure to comply with the most rudimentary of administrative procedures cannot be excused. The "bad faith" test is satisfied where a party knowingly asserts a frivolous claim; by any reasonable standard, the plaintiffs' action is frivolous and was instituted vexatiously and in bad faith.

CONCLUSION

For the foregoing reasons, and those set forth in the memorandum in support of the Commission's motion to dismiss, the defendant Securities and Exchange Commission should be awarded reasonable attorney's fees and other costs expended in the defense of this meritless litigation.

Respectfully submitted,

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Dated: July 25, 1977

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE CHAIRMAN

July 21, 1977

Letters to the Editor
The New York Times
c/o Mr. Hedrick L. Smith
N. Y. Times Bureau
1920 L Street, N.W.
Washington, D. C. 20036

To the Editor:

Three months is not a great deal of time to come to know an agency of some 2,000 people. Nevertheless, in the three months that I have been Chairman of the Securities and Exchange Commission I have developed a great respect for the integrity, ability, and dedication of my fellow Commissioners, and of the members of the Commission's staff. It is not hard to see why the Commission has consistently been identified as the best of the independent regulatory agencies.

It is therefore with real sadness that I have read two recent articles which, without any foundation in fact, impugn the integrity of this Commission and its staff.

In articles published on Saturday, July 16, and Tuesday, July 19, reporter Martin Tolchin asserts that the Commission has made a decision not to issue any report on its investigation of circumstances surrounding the sale of City of New York securities until after the September mayoral primary election. Furthermore, through innuendo and artful juxtaposition, these articles imply that the reason for this alleged decision was a desire by the Carter Administration to assist a political ally. These extremely serious and damaging assertions are absolutely unsupported and unsupportable.

The truth is that the Commission has not made any such decision and will release the New York City report as soon as it is completed. There has been no attempt whatsoever by anyone from the Carter Administration to exert any influence with respect to any aspect of the report, nor in fact have they even made any inquiry about it. I told all of this to Mr. Tolchin quite clearly prior to the publication of his first article. Our staff is continuing to work on what has been an extremely difficult and complicated investigation.

EXHIBIT A

The findings of the Commission will be released to Congress and the public at the earliest possible time consistent with our responsibilities under the federal securities laws.

During the 43 years of its existence, the Commission has built and maintained, sometimes in the face of very great pressure, a reputation for integrity, effectiveness, and independence of political considerations. It is only by virtue of the authority which such an unblemished reputation affords that an agency as small as the Commission has been able to do such an effective job of assuring the integrity of our capital markets, which are recognized as the finest in the world. I am saddened, and more than a little angered, that the integrity of this agency should be put into question without factual basis. And, I am at a loss to understand how one of the leading newspapers in the world could allow itself to be compromised in this fashion.

Sincerely,

Harold M. Williams
Chairman

→ file: New York City

Save our City with JOEL HARNETT as Mayor
SAVE OUR CITY, INC., SUITE 2703, 575 LEXINGTON AVE., NEW YORK, NY 10022
(212) 688-4546

May 5, 1977 Contact: Rennie C. Weber

HARNETT CALLS ON PRESIDENT CARTER
TO DIRECT IMMEDIATE RELEASE
OF SEC REPORT ON NYC BOND SALES

Joel Harnett , a Mayoral candidate in the Democratic primary today asked President Carter to order the Chairman of the Securities and Exchange Commission to release its report on New York City municipal bond sales.

"Delay", said Harnett, " has the same effect as a cover-up. If the report is not released by June 1st, the primary election could be a futile exercise in democratic rights".

"Petitions", Harnett pointed out, "start circulating on June 7. To act responsibly, signers have a right to know what involvement, if any, potential candidates had in the sale of the bonds and if there was fraud".

The SEC report was due to be released in the Spring of 1977. It deals with the sale of New York City municipal bonds and, specifically, whether fraud was committed by the withholding of vital information to the public.

Letters dealing with the release data of the report to the Chairman of the Securities and Exchange Commission by Joel Harnett's counsel, Gordon Marshall, have not been answered.

In a telephone call to Harvey Pitt, Chief Counsel to the SEC, Marshall was told that the stock phrase "The matter is still under investigation" could include a situation where the fact-finding has been completed but the Commissioners have not made up their minds to release the report.

EXHIBIT B

Mr. Pitt also said that the Chairman of the SEC could order that the report be released by a specific date, but he has not so ordered.

Harnett, therefore, wrote the President of the United States, asking him to direct the Chairman to complete and release the report by June 1st.

In the election situation in New York City, a delay would serve the same purpose as a cover-up if the report is not released until after the primary election. The people, in order to exercise their vote responsibly, must know the facts about their candidates.

* * * * * * * *

May 5, 1977

Letter to President Carter attached.

Robert B. Fiske, Esq.,
United States Attorney
Attorney for Defendant
Executive Office of the President of the United States
Michael Dolinger, Esq.,
Assistant United States Attorney

THE COURT: Gentlemen, I have before me the order to show cause on behalf of the plaintiffs. I also have a motion by the Securities and Exchange Commission to dismiss the complaint. They have requested that that be heard at the same time as the order to show cause.

Mr. Marshall, do you have any objection to that?

MR. MARSHALL: I am not delighted about it, your Honor. It was apparently delivered to my office late on Friday, and I only had yesterday to look at it. I read it, but I haven't prepared any papers in opposition. If I could get leave from the Court to submit an additional affidavit or memorandum of law in response to the motion to dismiss, I wouldn't be obstructive and oppose that motion being moved ahead.

The original notice of motion, Iwould like to note for the record, didn't have any return date, and I got a call from the SEC Friday or Monday -- I think Monday -- from Mr. Schropp, saying they wanted to put it on today.

I would like to have permission from the Court if the argument develops that I have to submit any papers in opposition that I be permitted to do so.

THE COURT: We will consider that after the hearing has been concluded.

MR. MARSHALL: I would also like to hand up to the Court an affirmation of service complying with all of the instructions in the order to show cause about telephoning the Attorney General in Washington, the Executive Office of the White House, which I have mailed copies, and I have a certified mail receipt of the mailing your Honor required I give to the Attorney General, and also personal service upon the SEC regional office last Friday, as well as the United States Attorney in the annex to this building, so that all of the requirements of the order to show cause have been complied with, with the exception I have not today delivered a copy personally to the Executive Office of the White House because there is no one here to receive it. But I did on Friday mail to the General Counsel of the President, Mr. Lifshitz, at his request, a copy, and I am sure it has been delivered to the White House now. It was mailed on Friday.

I believe I have complied with all the requirements of notice.

THE COURT: Is there anyone here representing the Executive Office?

MR. DOLINGER: Yes, your Honor. Michael Dolinger, Assistant United States Attorney.

THE COURT: You received a copy of these papers on Friday?

MR. DOLINGER: Yes, we did, your Honor.

MR. MARSHALL: Your Honor, I would like to submit a supplemental affidavit of mine which I would like to be before the Court for our argument, copies of which have been served on Mr. Pitt of the SEC and Mr. Dolinger of the U. S. Attorney.

This contains editorials of the New York News, New York Post, and the New York Times, as of this morning, supporting the position of the plaintiff in this action, and evidencing the public concern that the relief we are requesting be granted to the City of New York.

THE COURT: Mr. Pitt, I will hear from you on your motion to dismiss the complaint.

MR. PITT: If it please the Court, with me this morning are James Schropp and Marvin Jacob from the New York office. We are here in response to the Court's order to show cause which was entered on July 22nd, directing the Commission to produce a so-called completed report of its investigation of transactions of securities in the City of New York.

THE COURT: I have directed you to bring it. I haven't really directed you to produce it.

MR. PITT: I stand corrected, your Honor.

The plain fact of the matter is there is no complete report of the investigation, as the plaintiffs are well aware. They have been told this orally, they have been told this in our papers. This entire lawsuit strikes us as being wholly without merit.

As the plaintiffs' own pleading and press releases evidence, it seems the reason for this lawsuit is the plaintiffs' desire to generate a source of publicity for Mr. Harnett's mayoral campaign.

We believe the Commission and this Court are being badly abused in this process. Above all else, and before I address myself to the motion, I want to state just as plainly as I can that this attempt to generate publicity is wholly without a shred of truth, and it comes at a very high cost, the defamation of an agency whose integrity stands beyond reproach in this matter as in all others.

The pleadings filed are virtually scandalous. They allege corruption, deliberate leaks, and suppressing of reports, and I strenuously object on behalf of the Commission to this kind of treatment.

The plaintiffs, as I have indicated, have predicated their entire cause of action on the erroneous assumption there presently exists a completed investigative report. That is not so. As evidenced by Mr. Moran's affidavit -- he is the Regional Administrator in the City of New York who has responsibility for the Commission's investigation -- as well as the preparation of an initial report to be sent to Washington, as evidenced in his affidavit which was appended to the Commission motion to strike this order to show cause, I quote:

"The New York Regional Office has at the present time not completed its investigation in the matter of the City of New York, and no complete report has been written or sent to the Commission in Washington, D. C.

"Instead, the staff of the New York Regional Office is actively engaged at this very moment in completing its investigation and its report."

For that reason alone there is no reason to continue this action. It seeks discovery of a document that is as yet non-existent.

Moreover, the action is frivolous.

The plaintiffs predicate their action on the Freedom of Information Act. Yet at no time before this lawsuit did the plaintiffs seek documents under the Freedom of Information Act, nor do they mention that Act in their brief flurry with the Commission.It seems fairly self-evident that the plaintiffs' allegation under the Freedom of Information Act is nothing more than an afterthought.

THE COURT: Isn't there a provision in the Freedom of Information Act, and isn't there a provision in the SEC regulations, that pertain to the Freedom of Information Act dealing with taking requests in substance as being requests --

MR. PITT: There are provisions which require that a request detail with some specificity the document or documents being requested. The Commission does not stand on merely formalities. The fact someone is inarticulate or inadequately characterizes his request does not deny that. What is essential in that process, your Honor, is that the Commission know it is a request being made under the Freedom of Information Act.

If you look at Mr. Marshall's correspondence, it nowhere mentions the Freedom of Information Act, nowhere details a request for report. What it talks about is the fact that an investigative report is being prepared which Mr. Marshall thought would be of use to the citizens of New York, and he called upon the Commission to produce that report.

I responded to Mr. Marshall first orally by telephone, and then by letter, saying we were sensitive to his concern and just as soon as our investigation was completed we would attempt to do so.

That was the end of the matter as far as we were concerned. Nowhere on the face of these documents, either implicit or explicit, is there a request for a document.

I suggest, your Honor, that this is an afterthought. In any event, it seems to me if the plaintiffs are truly concerned about the publication of a meaningful report of investigation this action is counter productive. The mere pendancy of this action has diverted a substantial amount of our staff's time that otherwise would have been spent on the ongoing efforts to complete our investigative work.

And, worse, if the Commission were compelled to accede to the plaintiffs' request for the thousands of pages of documentary evidence that have been amassed, not only would the public be inundated with an amount of raw data, but the staff's work would necessarily draw to an insurmountable time span.

We have sought the costs of this litigation, including regional attorneys' fees. We respectfully suggest to the Court neither it nor the Commission should be abused in this fasion. If the Court is not inclined to dismiss on the Commission's motion, we nevertheless would suggest the order to show cause should be vacated, and I can address myself to that question if your Honor wishes to hear me on that subject at this time.

MR. MARSHALL: I would like to get into the motion. I think their motion to dismiss the complaint is a red herring. Unless you want me to address myself to it I will wait. I would like to make one comment --

THE COURT: You will have a chance to comment. Mr. Pitt is now proposing to address himself to your motion. I will listen to him, and then listen to you, unless you would prefer to be heard --

MR. MARSHALL: I would like to be heard on the motion to dismiss, your Honor.

THE COURT: All right.

MR. MARSHALL: Your Honor, my letter to the Chairman of the SEC, which is contained, printed in Paragraph 27 of the complaint at page 11 -- and I have never been accused of being inarticulate before, but it says in the first paragraph: "I would appreciate your furnishing to me by return mail a copy of the SEC report on the results of its investigation of the sale of New York City bonds and securities and whether or not such sale and the practice involved in the disclosure of city financial information is deemed to have been a deception of the public."

Then I set forth my reasons, and refer to the sunshine laws, in quotation marks, which are the laws of the United States granting access of the public -- technically, they grant access to public hearings -- and the Freedom of Information Act to documents.

There is no requirement under the Freedom of Information Act that the Freedom of Information Act be specifically referred to. In that connection, however, after I wrote a letter to Mr. Williams, and didn't get an answer, I called his office three or four times.

THE COURT: There is a very specific requirement in the regulations of the SEC that when you make a request under the Freedom of Information Act that you address that request in certain channels and that you label the request as a Freedom of Information Act request.

MR. MARSHALL: That is true. And they mention that in their memorandum, your Honor. You have to send it to the public information desk, and mark the envelope Freedom of Information Request, and I did not do that. I was not aware of that regulation at the time.

But they do go on to say in their memorandum that the Commission -- I am reading from page 8 of their memorandum, the initial memorandum -- "The Commission does not insist on formalistic compliance with its rules relating to requests made pursuant to the Freedom of Information Act so long as a person can be understood to be seeking access to some specific record or records, rather than making a generalized inquiry such as made by Mr. Marshall."

I think the Court can determine by my letter, which I have read from Paragraph 27 referring to the SEC report on the results of its investigation of the sale of New York City bonds and securities, that it is not inarticulate, and anyone reading it would know what I was asking about.

As a matter of fact, I was starting to tell the Court when I called Mr. Williams several times because I hadn' received a response to my letter I was told it had been scheduled for response by Mr. Pitt. And on my third or fourth call Mr. Williams' secretary transferred me to Mr. Pitt, and he referred to the fact we had a telephone conversation and I spoke with him.

Mr. Pitt well understood my demand was under the Freedom of Information Act, because in the course of our conversation he said, "Are you going to sue under the Freedom of Information Act?" And I told him I hadn't decided yet, that I didn't want to bring needless lawsuits, but if I felt we had a chance of recovering the information I would.

And Mr. Pitt said if I do decide to sue under the Freedom of Information Act would I do him the courtesy of calling him first and telling him, which I did, before we brought the lawsuit, so that this business of Mr. Pitt saying he didn't know the request was under the Freedom of Information Act is not an accurate statement to this Court because we specifically discussed it. We mentioned the Freedom of Information Act, and he anticipated a lawsuit would ensue.

So that my point is, your Honor, that motion to dismiss our complaint by the SEC should be denied because at all times they have known we were asking for a specific report which has an awful lot of publicity over the last twenty months. The SEC started this investigation in January 1976, twenty months ago. If they had utilized the industry in producing papers on these motions in Court since last Thursday and Friday, they wouldn't be telling the Court now that the report is not ready.

THE COURT: Have you ever had anything to do with a securities investigation, Mr. Marshall?

MR. MARSHALL: No, I have not.

THE COURT: I don't think that you would think a period between January 1976 and July of 1977 was a very long period if you had some experience with securities.

MR. MARSHALL: I have no experience so I am not prepared to comment on it. However, I have been reading the press over the last five or six months, and I have been reading the speculation that the report will be released after the primary, September 8th, 1977, and I think it is the essence of our lawsuit that it is a grave disservice to the people of the City of New York who are being asked to exercise their franchise.

THE COURT: Wouldn't it be a greater disservice to rush to the press with a report which was inadequate and which was not fully investigated?

MR. MARSHALL: If the matter has not been fully investigated, and if all of the facts are not in, I don't want to rush anyone to do anybody a disservice.

THE COURT: We have an affidavit here from Mr. Moran who says precisely that.

MR. MARSHALL: That is what Mr. Moran says. Mr. Moran's affidavit is worded in a way where he qualified it by saying that he hasn't delivered a complete report.

In fact, your Honor, in all of the papers with which I have been inundated the only statement under oath is a page and a half affidavit from Mr. Moran in which he says they are still working on it, that the completed report has not been delivered. But nowhere does he deny the story of Martin Turchin published in the New York Times that the report was delivered to the SEC in Washington a week ago Friday.

I telephone Mr. Turchin yesterday, and asked him about it, and he stated to me if asked to testify in court he would testify that he had a direct conversation with Mr. Williams just before writing that article and Mr. Williams, the Chairman of the SEC, said the report from Mr. Moran's regional office was delivered to the SEC in Washington a week ago last Friday.

It seems to me there is a shell game going on: Under which shell is the report, and where is it, with confusing semantics with respect to whether it has been completed and where it is. The Court ordered them to bring the report to court today. I don't know whether they have or have not complied, but I would suggest that making a motion that this court vacate and strike that portion of its order asking them to bring it is not an excuse for not bringing it.

In their affidavit as to the merits where they claim exemption they don't talk in terms of there being thousands of pages of raw data. In their motion to strike they know pretty well what is in the report, and it is not that difficult to get their hands on it. They summarize it very well in a paragraph, and they describe the two exemptions that they would seek this Court to apply, and when we get to that part of the argument, hopefully, I would like to be heard on the fact that the exemptions do not apply.

But when they talk about the report in the motion, that the Court not examine the report in camera, and the Court not direct it be released, then there is no question they know what they are talking about, and the substance of it.

In addition, if we would examine the case law, your Honor, this Court is authorized by Congress to examine whatever data they have accumulated with respect to the factual investigation as to what happened with respect to the finances of the City of New York. When they it is not completed, it may not be completed with respect to a recommendation by the SEC as to legislation to Congress to cure or remedy whatever situation they feel it should be -- it may not be completed with respect to any conclusions that the SEC may want to make about it, but the facts have been gathered and the people are entitled to know the facts.

As I started to say, if we review the case decisions -- and I would ask leave of the Court, because I have just been inundated with their papers yesterday to submit a memorandum of law -- case decisions are clear that this Court has the power to examine the facts, to examine their documents in camera, in chambers, privately, and the language of the cases is to unintertwine and to separate their conclusions that need not be made public from the facts in order to release the facts.

As the New York Times stated in their editorial today, you have the power -- not thatthe New York Times is legal precedent, your Honor, but it is a correct statement of the law -- you have the power that if they have not completed it, to tell them, "Complete it." Give them a time limit and to bring whatever they deem to be a completed report to Court, and for the Court to release it in advance of the primary, so people have time to discuss whatever issue may be raised.

THE COURT: Isn't it a rather unique suggestion, Mr. Marshall, that the investigative work of the SEC should be conditio to the exigencies of a local political campaign? Isn't that what you are saying?

MR. MARSHALL: No, your Honor. The election has been fixed by the state legislature and the bill signed by the Governor to be September 8th. The SEC has been investigating this situation since January 1976.

Now, granting that an investigation is time consuming, and granting that it is a complicated matter, I am not the one who has been leaking material to the press that the report is complete.

Mr. Pitt told me when I spoke to him on the phone two months ago that the report reads like a Who's Who of New York.

I am suggesting to the Court that it is not my argument the report should be completed. The information that I get from Mr. Tulchin, Mr. Pitt, and from other people, and just reading the press like any other citizen, indicates that the report has been completed essentially, that the fact finding has been completed, but they use the phrase "still under investigation."

Even if the investigation is completed

but the SEC hasn't taken an actual vote to release it the Freedom of Information Act affords -- and it doesn't even have to be a citizen -- the protection of the Court to see that information is released to the public.

I haven't fixed the date of the primary election, but this is the most important and critical period in the history of the City of New York, and the voters have a right to know who is responsible for the sale of municipal securities at a time when the city supposedly was bankrupt. This isn't my own speculation. This is part of an interim report by the State Banking Commission of New York stating that at a time when municipal securities were sold people in the government were already using the term "bankrupt," and then had it expunged from whatever minutes of meetings they were conducting, and then decided not to keep minutes any more.

It is a scandalous situation that is being investigated. I urge upon you, your Honor, knowing you to be a fair man, and with your background and experience, that it is more damaging to people running for public office to be the subject of speculation that may not be based on fact than to have the facts presented to the public.

In New York Magazine this week they say sources close to the SEC have revealed that the report will be released before the primary. And then the article in New York Magazine goes on to say that it is speculated it will be damaging to Mayor Beame.

I don't know whether it will be damaging to Mayor Beame or to anybody, but I think the public is entitled to the facts. What the SEC is doing by moving slowly as far as saying that it is complete until after the primary election is really in effect to maneuver and manipulate public opinion.

These are facts in our free society that should be disclosed before the people vote, not after. I am urging the Court -- I have gone beyond the motion to dismiss because the real meat of our argument I think is what I am talking about now -- I urge the Court to ask the SEC, to deny their motion to dismiss. Deny their motion because you have a right to examine and make a determination for yourself.

Congress was also very clear, your Honor, that broad powers are granted to the Court, especially in the '74 - '76 amendments, to interpret the Freedom of INformation Act broadly, as widley as possible, to disseminate as much information as possible. The public policy is to grant disclosure, to enjoin the withholding of information.

One of the provisions of the Freedom of Information Act is, your Honor, that the SEC has the burden, or the government agency involved has the burden, of demonstrating. I have no burden on this motion.

THE COURT: You do have some burden. Don't you have the burden of showing that you have made a request for information that falls within the provisions of the Freedom of Information Act?

MR. MARSHALL: Yes, your Honor.

THE COURT: And that both the Act itself and the regulations of the SEC which have been drawn up under that Act set up certain requirements, certain time tables, set up certain channels, and so far as I see you have not followed the channels at all. As a matter of fact, I think you said earlier you did not even know about them.

MR. MARSHALL: I didn't know about the SEC's internal rule that a request had to be sent to a public information officer.

THE COURT: Don't you think there is a fairly good reason for these rules?

MR. MARSHALL: Yes. But as the SEC said in their brie, page 8, the Commission does not insist on formalistic compliance with its rules relating to requests made under the Freedom of Information Act.

I might add that those rules are designed so that the SEC isn't surprised; they know if there is a request under the Freedom of Information Act that they must follow certain steps themselves as prescribed by the Act.

I thought that I made it clear, and I have not been contradicted by Mr. Pitt, that in my phone conversation with him he was well aware as general counsel of the SEC my letter to Chairman Williams was under the Freedom of Information Act.

He knew which report. He didn't say "What report?" He knew what I was asking for, and he went further to ask me whether I was going to bring lawsuit under the Freedom of Information Act.

Although I didn't write on an envelope "Freedom of Information Act request," I think I essentially complied with the provisions of the Freedom of Information Act, which provide merely that a person has to make a request -- I beg your indulgence for one moment, your Honor.

I am reading from Section 552 of the Freedom of Information Act, Title 5, U. S. Code, subdivision (a) (3): "Except with respect to the record made available under Paragraphs (1) and (2) of this subsection, each agency upon any request for records which (a) reasonably describes such records; and (b) is made in accordance with published rules stating the time, place, fees, if any, of procedures to be followed shall make the records promptly available to any person..."

I think my letter to Chairman Williams is unambiguous, and my conversation with Mr. Pitt demonstrates he knew very well that I was asking for information under the Freedom of Information Act, because he went so far as to ask me whether I was going to start suit under the Act.

My letter to Mr. Williams was assigned to Mr. Pitt, and Mr. Pitt's response did not advise me of my right to appeal, and it did not issue from the SEC within the ten days required. The failure of the SEC to act in that manner gives this Court original jurisdiction to hear the problem, and enables this Court to review the documents in camera and to decide what, if anything, should be released to the public.

When I submit a memorandum of law I will demonstrate to your Honor that none of the exemptions that they claim are applicable to this situation. They claim, for example, under subdivision 7 of the exemptions that if the report is made for law enforcement purposes it should be exempt. But nowhere in their briefs do they state that it is for law enforcement purposes. It is for investigatory purposes. Investigatory purposes is not one of the protected exemptions under the Act.

They also talk in terms of inter-agency memoranda. What we have here is not inter-agency memoranda. I am not interested, for example, in whether Mr. Moran made a recommendation to the Commission that something should or should not be done by the SEC. I am interested in getting at the raw facts that the SEC has uncovered.

The SEC is a public investigatory agency financed by public funds. The people of the City of New York are entitled to know what the SEC found. I think that this Court can render a great public service to the people of New York by granting our motion after examining the SEC report in camera and by releasing so much of the report that is factual and that relates to the situation of the City of New York.

An informed citizenry, your Honor, I am sure you and I learned this in school, is a strong citizenry. And our democratic process is only as strong as the information the people have in order to exercise their franchise to vote and select those people who will lead them for the next four years.

It seems to me that we have had enough of cover-up, of finding out about things that happened after elections were we had to impeach people. The citizens should know beforehand without any gaps, without any eighteen-minute gaps. The citizens should know what the facts are beforehand.

The SEC, I have a lot of respect for them. Nobody has maligned them, and we have not accused anyone of coverup. There have been articles in the papers of various people charging that.

THE COURT: Those articles are quoted in your papers, though, Mr. Marshall, are they not?

MR. MARSHALL: Yes, so the Court would know how damaging it is for the speculation to go on without the facts coming out.

One of the articles in the paper attributed to one of the candidates, not the plaintiff, he thought there was a fix.

I don't personally think that, but I don't know. We were careful to say in our papers that we don't know what the situation is. But not releasing the facts now to the public has the same affect as a coverup, whether or not there is one.

It seems to me if we could put a man on the moon by 1970, it seems to me during the month of July, or the first two weeks in August certainly, this Court can see to it the facts are disclosed to the people of the City of New York.

THE COURT: What is your understanding, Mr. Marshall, of the function of an order to show cause?

MR. MARSHALL: My understanding of the function of an order to show cause is that it is a motion brought on in a shorter length of time than an ordinary motion, and therefore requires that it be ordered by a judge rather than a mere motion from an attorney. It is something that deals with a situation where time is of the essence, No. 1. And also an order to show cause affords the person seeking the order to show cause to obtain judicial relief from the court in advance of the return day of the order.

For instance, I couldn't make a motion and in the motion ask that the SEC bring the report with them. But if I go to Court and on good cause shown by affidavit I have the possibility, as in this case, of persuading your Honor to expedite the matter in order to cause them to give us the relief in advance of having the report here if the Court is disposed to seeing it there wouldn't be any further delay.

THE COURT: I am asking that question in connection with the publicity that was given to this order to show cause. On Friday, did you put out a press release?

MR.MARSHALL: No, I did not, your Honor.

THE COURT: Did any one representing you put out a press release?

MR. MARSHALL: I understood afterward, your Honor, I got a call late Friday night, that a press release was put out by a corporate plaintiff Save Out City which I did not know about. I have not seen it to this day, and I strongly objected to it.

THE COURT: I want to see a copy of the press release.

MR. MARSHALL: I will deliver it in chambers. I have not seen it to this day yet. I am aware a Joyce Pernick telephoned you in chambers, and I was terribly upset about that. I will get a copy of the press release to your chambers within an hour or two.

THE COURT : You have not only responded to Mr. Pitt's motion to dismiss, but I take it you have now made your argument in support of your own motion; is that correct, sir?

MR. MARSHALL: I have, your Honor, although I have not gone into detail nor cited some of the cases on which I have notes, although not a memorandum of law, as to why the exemptions they claim are not valid.

I think they recognize the fact that their motion to dismiss is merely a pro forma exercise they should go through, because they deal pretty much in detail in their papers with respect to the exemptions.

I would like to sit down and hear Mr. Pitt with respect to the exemptions. I have made my argument why it should be disclosed, but I would like to argue why the exemptions do not apply, or as to why you should see what they have in order for you to determine why they shouldn't apply.

THE COURT: I will hear from Mr. Pitt.

MR. PITT: Your Honor, with the Court's indulgence. before I turn to those matters I think a few things do need to be clarified for the record.

My recollection of my phone conversation with Mr. Marshall is terribly clear. There was no reference to the Freedom of Information Act. My office handles hundreds of lawsuits every year, and we do not invite people to find additional ones.

In addition, Mr. Marshall's reliance on the New York Times for Chairman Williams' statement is wholly misplaced. Indeed, this morning's New York Times contains a letter from Chairman Williams to the editor of the Times indicating that the only conversation he had with Mr. Tulchin was to indicate no completed report had been prepared yet and the Commission was not motivated by political concerns as it never has been.

I think your Honor correctly stated our position. It would be just as deleterious to release a report that is not ready to release as to sit on a report that is ready to be released.

The Commission's position is very simple. When its staff has completed its work, which has not been done, and I think Mr. Moran's affidavit is clear. When the staff has completed their work and it is sent to the Commission that report will be released just as quickly as is consistent with the Commission's responsibility.

It has never been, and will not now be in this case, subject to political motivation either from pressures from Mr. Harnett or other plaintiffs whom Mr. Marshall represents, or otherwise.

THE COURT: Let me first take the first point, whether or not the disclosure was made to you that this was a Freedom of Information Act request. The letter to Mr. Williams has in the last paragraph, or as the last paragraph, this sentence: " I call upon you, pursuant to the sunshine laws, to make such disclosure of your reports on such subject matter to me by return mail."

Is that ambiguous?

MR. PITT: It is to us, your Honor.

I think if your Honor looks at the Commission's regulations which are cited in our memorandum, page 6, they make quite clear the fact that we are asking to be, first of all, told there is a request under the Freedom of Information Act; and, secondly, to be told what to do about fees;and, thirdly, I think that letter essentially was read in the context in which it was sent, which is "here is a candidate for political office being represented by Mr. Marshall, who says you've got this report, and I would like to see it."

The Commission's attitude to that -- and the reference to the sunshine laws is entirely consistent with that kind of impression -- is that an agency should conduct its business in the open. But it is not a request for a specific document under the Freedom of Information Act.

Indeed, Mr. Marshall would probably have objected if there had in fact been a report at the time, which he was told by phone there was not. He would have been aghast at the huge printing bill sent to him, and our rules do not permit us to do that without authorization which he never sent to us. Essentially, his letter was wholly without conformance. I think if you look at the rule cited on page 6 it comes nowhere near to that, and I must say as unequivocally as I can it never dawned on us we were receiving a request under the Freedom of Information Act. Had we received such a request, it would have been a very easy matter to dispose of it. Our Commission, I might add, has one of the best records in responding to Freedeom of Information Act requests within the time periods specified by the Act. This one I think on the merits would have been very simple to dispose of. There was no reason for us to misconstrue his letter, nor was there any reason for us to unduly delay in responding to it.

The only reason for the rule we cite on page 6 is to avoid precisely the kind of confusion and ambiguity that Mr. Marshall's letter caused in this case. I think, your Honor, that it is terribly ambiguous at best, and, frankly, I don't think it ever occurred to Mr. Marshall to make a request under the Freedom of Information Act. I think that came after, and that is when this lawsuit was instituted. If it had been his letter to me would have indicated that.

I am a responsible government official, and if I presumed I had been receiving a Freedom of Information Act request, I would have indicated the precise nature of his rights. We have specified forms for our letters in response to Freedom of Information Act matters. If you read my response I object to the fact that Mr. Marshall issued a press release which distorted our telephone conversation, and then indicated that I thought that was the end of the matter.

His letter back nowhere mentions the Freedom of Information Act. Had we discussed it in our phone conversation the least I would have expected he would do would be to make a reference to it in his letter.

I urge the Court to conclude, as we do, this is merely an afterthought and has nothing to do with the letter sent to us.

THE COURT: There is no question that letter is consistent to make it a request under the Freedom of Information Act.

MR. PITT: Your Honor, in light of hindsight one can formulate a picture. Had I known about this lawsuit we would have sent it to the processing branch --

THE COURT: Mr. Marshall said in one telephone conversation you asked him whether he intended to sue.

MR. PITT: That is wholly fictitious, and I deny that, your Honor. He either had a conversation with someone else not with the Commission or he simply erroneously --

MR. MARSHALL: I will submit an affidavit stating under oath Mr. Pitt asked me to do that, and if I did would I call him, and I agreed to do so, and I did so.

MR. PITT: I will submit a contradictory affidavit, your Honor. As I indicated at the outset of this rebuttal discussion, I would not invite an additional lawsuit. We have far too many of them. And had it ever occurred to us this was a Freedom of Information Act request, it would have been processed.

Again I indicate Mr. Marshall's second letter nowhere mentions the Freedom of Information Act. His letters are inconsisent. I simply think he cannot avoid the fact his letters were not intended as Freedom of Information Act requests, and he is now trying to make them into something they were not at the time that they were sent.

THE COURT: You say if you had realized that it was a Freedom of Information Act request it would have been processed. Does that mean there was no processing so far as this letter is concerned addressed to the Chairman of the Commission?

MR. PITT: That is correct, your Honor. It was not treated as such. Letters of Freedom of Information

Act requests are sent to our Freedom of Information Act section. They then attempt to find out whether a document exists. In this case they would have presumably determined no document existed corresponding to what was requested. They would have then prepared a letter to Mr. Marshall which said the Commision doesn't have the document you request, it does not exist at this time, and your request is, therefore, denied; you have a right to appeal the determination to the Commission, and the Commission will take twenty working days within which to respond, and if it does not respond you have a right to go to federal court.

At that juncture Mr. Marshall would have been compelled to file an appeal. When that appeal was received that would have been processed by my office, and we would have reviewed it to determine whether in fact there was such report.

In this case we would have found there was no report because there was none at the time the letter came in, and there is none today. We would have sent the letter tothe Commission, Mr. Marshall would have received a letter denying the existence of the report he had requested, and would have been told what his legal rights were.

I can produce for your Honor hundreds and hundreds of letters I send out every month on Freedom of Information

Act requests.

There was no reason to discriminate against Mr. Marshall. I had no idea, and I don't think he had any idea, that this was a Freedom of Information Act request.

THE COURT: All right. Proceed.

MR. PITT: As tothe specific merits of the order to show cause, I think the points are essentially very simple, your Honor.

The affidavit of Mr. Moran sets forth, in my view, two critical facts. One is that there is no report of investigation at this juncture. This is no attempt to be disingenuous in the language of Mr. Moran's report. We have produced our papers in rather a short time in respons to Mr. Marshall's motion. The fact of the matter, as Mr. Moran states in paragraph 2, is that the matter of the City of New York is an active investigatory matter. It is actively ongoing at this moment. The staff has not completed its work. And it is an investigative matter for law enforcement and other purposes.

Exemption 7 of the Freedom of Information Act, particularly 7 (a), expressly exempts investigatory records compiled for law enforcement purposes.

The Commission issued a release on January 8, 1976, which made clear that it was undertaking an investigatory proceeding to determine whether law enforcement or other action would be appropriate. At this juncture the files that we have compiled, the records that exist, are existing with respect to an ongoing law enforcement inquiry.

THE COURT: The exemption from the Freedom of Information Act for law enforcement purposes is a fairly qualified exemption under the law. It is an exemption to investigatory records compiled for law enforcement purposes, but only to the extent the production of the records would interfere with enforcement proceedings, deprive a person of a right to a fair trial, and impartial adjudication, constituting invasion of personal privacy, disclose the identity of a confidential source, disclose investigative techniques and procedures, endanger the life or physical safety of law enforcement personnel.

And then there is an exemption so far as materials furnished by confidential sources.

Is it your position that some one or all of these situations obtain?

MR. PITT: I think a numberof them would obtain, your Honor, precisely. I think the fact of the matter is that our staff is presently in the process ofdetermining, first, what they facts they have compiled show, trying to pull those facts together. Even that has not been fully completed at this juncture.

Then they are attempting to decide whether and what to recommend to the Commission. At this juncture for us to be compelled to turn over these records would, first of all, interfere with that proceeding. The work is proceeding apace. We would have to divert an inordinate amount of manpower.

In addition, it would prejudice the rights of individuals at this juncture to have undifferentiated raw materials disseminated. As your Honor may be aware, in connection with the securities investigation we get investor complaints -- we have a whole section on that -- which often turn out to be either mistaken impressions or accusations that we cannot verify. We also have confidential sources involved.

It seems to me that this is a prima facie case of investigatory files compiled for law enforcement purposes. It is precisely that purpose that the Commission is pursuing at this moment and that Mr. Marshall's motion would seek to disrupt. I think if your Honor refers to our response to the order to show cause on page 6 we there cite the Court to a decision by the Ist Circuit in New England Medical Center Hospital against National Labor

Relations Board where the Court takes great pains to discuss exemption 7 (a) provisions.

That follows, I might add, a very important decision of this Circuit, Title Guaranty Company against National Labor Relations Board, cited on page 7. Essentially, the Court held that it is difficult to conceive of a greater interference than one which would involve the court in arbitrati[illegible] the agency's control of what documents to retain and what documents to surrender immediately prior to enforcement proceedings. That is precisely the situation we are in now.

With all due respect to the New York Times, I think the Commission must pursue its own investigation as promptly and expeditiously as it can, but it must complete it to its satisfaction. That has not been done in this case.

I think the exemption 5 matter referred to is equally as strong. From pages 3 to 5 of our response, the cases make quite clear the fact that these communications between staff members -- that is what we are dealing with at this juncture -- at this juncture we have a lot of documents floating between staff members. We have no completed documents. We have major sections still being written at this juncture. That kind of documentation, even to the extent they include factual matters, are clearly exempt from the internal memorandum exemption.

From a supplemental document, cited on page 5 also, the response your Honor is looking at, footnote 3, we cite Safeway Stores Incorporated against Federal Trade Commission, which I think is quite analagous, where the District of Columbia court held that a 170-page staff report that there was completed, even though it contained factual matters, fell in exemption 5 because it contained the staff's recommendation and analysis of factual matters that had been developed.

That is the best that can be said for our situation. Indeed, our situation is an a fortiori rescission situation because we do not have the completed report. It is exeedingly difficult for the Commission to prove a negative. I can only stand before this Court with Mr. Moran's affidavit in hand and the good faith of the Commission, and assure this Court that there is no completed report. Work is still progressing. This entire course of action is highly disruptive of the efforts. People in our regional office have been diverted from this matter to prepare affidavits for us, give us a review of what the status of materials was, and it has been highly disruptive without reason or cause because Mr. Marshall has read a few newspaper articles erroneous in their fashion, and which we have insisted under affidavit are erroneous.

I urge this Court either to dismiss this action or in light of the order to show cause, if the Court sticks with that, to conclude as we have urged that exemption 5 and 7 would exempt whatever materials do exist.

THE COURT: I take it, Mr. Pitt, that the SEC does not argue that exemption 8 applies.

MR. PITT: Your Honor, there is a basis for asserting that, and particularly witb respect to the sections of the report which had been drafted concerning the banks and other financial institutions, but I think the Commission has generally found that exemptions 5 and 7 cover all of its materials. Those are the exemptions that are most important to the Commission, and we do not assert it in our moving papers. I do not think that the exemption is irrelevant. I think we could rely on it. It unfortunately pertains to a portion of the record that is still in the process of being drafted. That is part of the problem with all of this material, that it is difficult to claim exemptions for materials I cannot personally even see.

THE COURT: I think, Mr. Pitt, you better tell me fairly precisely just what there is that is available with respect to the records or the report, the one that was called for.

MR. PITT: Your Honor, I am personally unable to do that at this moment because there are so many pieces in process. We can give your Honor, if your Honor insisted, in camera a report as to what stages are in preparation, but I think this action does not call for that. I think that the fact of the matter is that we are in the midst of an investigation, the exemptions are clear, and applicable on their surface, and I think it would be unnecessary and I believe inappropriate to ask the Commission to divulge what the contents of the staff's report will be when those portions are still in the process of being drafted.

I can give your Honor the affidavit of Mr. Moran, and it can be expanded if there is any question about its completeness. I strenuously urge before this Court it is not necessary to advise this Court of what portions are being drafted at what stages.

THE COURT: I am not sure that it is necessary, but I think it is necessary to do more than to quote a rule or quote a statute, an exemption in the statute, claim it, and then consider that binding on the Court.

Investigatory records compiled for law

enforcement purposes. Is it your position that everything the SEC compiles is compiled for law enforcement purposes and hence is exempt unless a decision is made by the public information officer or some higher authority within the SEC?

MR. PITT: No, your Honor. I take your question in the broader sense. Not everything the Commission compiles is compiled for law enforcement pruposes. Were that the case, we could exempt everything in our files. I think we have a decent record in making materials available under the Freedom of Information Act. I am talking about this specific case.

THE COURT: You are now taking the position that you should not submit to me in camera the report, or whatever it is that exists?

MR. PITT: Your Honor, there is no report. I could bring --

THE COURT: Let me go on.

You are taking the position you should not submit to me in camera because it would only be submitted to me if we got past the threshold. I am asking what law enforcement purposes are involved with respect to this report. I don't think it is enough for you just to say "law enforcement purposes." I think you have to make some showing that there are law enforcement purposes that would be served.

MR. PITT: I agree completely with that, your Honor. The law enforcement purposes are that the Commission staff has studied a number of transactions and circumstances involving its sale of New York City securities. In that context they have viewed the conduct of a number of persons and entities. Those persons range from underwriters and bond rating agencies and the like.

The Commission at this juncture is expecting a report from its staff as to the conclusions they have drawn, the factual findings they have made, and then the Commission will consider whether or not, first, as indicated in the release, to institute law enforcement action against any person or persons; second, whether to issue an investigative report pursuant to Section 21 (a), which gives the Commission the discretion to issue a report, perhaps refer it to the Attorney General, if warranted, for criminal prosecution of any person or persons, or if it should conclude to recommend to the Congress legislation should be enacted because the Commission may have found the conduct, if there is any violative conduct or conduct adverse to the public interest, falls within the existing rules and regulations.

All of thoese at this juncture are possibilities before the Commission.

The entire investigation was compiled to determine whether violations of the federal securities laws occurred. The Commission put out a release to that effect, and, indeed, the plaintiffs concede that. In every piece of paper they have filed they concede this is an investigation which deals with questions of potential violation of the federal securities laws.

I submit to your Honor that this is a prima facie showing of our entitlement to exemption 7.

THE COURT: Do you have in any of the papers you have submitted a copy of the release of January 1976?

MR. PITT: I don't think so, but I do have a copy with me in court which I will hand up to your Honor right now.

(Pause.)

MR. PITT: Your Honor, I apologize to the Court. I am fairly confident I have a copy with me or can produce one shortly.

I also do have, which I can submit for in camera inspection to your Honor, the formal order of investigation that the Commission instituted which might be of more utility. This is a non-public document.

THE COURT: Very well.

(Document handed to the Court.)

MR. MARSHALL: Am I not entitled to see that? Is that what you are saying?

MR. PITT: Yes. I would respectfully submit that this is a non-public document which the Court can examine in camera. It has not even been requested in this transaction. It is being produced to your Honor to indicate the parameters of the investigation that was undertaken.

THE COURT: Mr. Marshall, if you object to my inspecting this in camera I won't inspect it.

MR. MARSHALL: I'm all for you inspecting anything they introduce in camera. I trust the Court implicitly. However, if you read it and you determine there is no objection to my seeing it --

THE COURT: I will take it with the understanding it is in camera.

MR. MARSHALL: I have no objection.

THE COURT: Anything further?

MR. PITT: No, unless there is something specific I can respond to .

THE COURT: I will hear from Mr. Marshall.

MR. MARSHALL: Your Honor, I would like to deal with the question of whether the exemptions apply.

I would like to refer orally to case law researching the right to submit within the next 24 or 48 hours a memorandum of law for your assistance.

Your Honor, as you correctly noted in questioning Mr. Pitt. these exemptions are not blanket exemptions. They are very, very qualified.

Before I go into the exemptions, I would like to refer the Court to specific statements in the Freedom of Information Act, Section 552, subdivision (b):

"Any reasonably segregable portion of a record should be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

That is pretty clear. It means they can't just come into court and say "Exemption under subdivision 7 or subdivision 5" without going further. In that connection there are cases I am sure known to your Honor and your staff that they must come in by affidavit or by oral testimony at a hearing and cite chapter and verse with respect to everything that they are attempting to withhold from the public to show the specific raason why that specific information should not be released.

They have not done that. Nowhere in the papers filed with the Court on any of the motions is there a statement under oath by anyone connected with the SEC with respect to any aspect of the investigation. This argument on this motion is being conducted almost as if it were an administrative hearing where the SEC is the prosecutor and hearing tribunal and the ultimate determining judge, because they are coming to court with a memorandum of law saying it is not completed and not saying under oath how the specific exemptions apply to any specific material.

They are saying, "Judge, believe me, it's not ready, and when it is ready we will release it."

That is not the purpose of the Freedom of Information Act. The purpose is for them now to bring the report to you for you to examine, and, under the case law, for them to go into specific detail under oath either by affidavit or oral testimony, if the Court deems it advisable, and set forth specifically with respect to every scrap that they have in support of their burden in sustaining prohibition of publication of any aspect of it.

THE COURT: Let me summarize what I understand the SEC is saying. They are saying that you have demanded a report. They are saying that they did not understand that that was a demand under the Freedom of Information Act.

They have now been informed it is. They say there is no such report in existence. They say in January of 1976 it was announced that they were going to make an investigation with respect to muncipal bonds in New York City, and that investigation is underway.

They say further that it has been carried on by the New York regional office, that the report has not been submitted to the Commission, and that until such time as it is submitted to the Commission there will be no report such as you have demanded.

They say what exists now is one or more intra-agency memoranda,and they say there is a specific exemption, categorical exemption, under 552 for intra-agency memoranda which would not be available by law to a party other than an agency.

They say what exists today is absolutely exempt from disclosure under subparagraph 5, and even if it were not exempt under subparagraph 5 it would be exempt under the law enforcement paragraph, which is paragraph 7.

MR. MARSHALL: I understand that to be their argument. I don't accept the premise of their argument that the report is not completed. I do not accept the premise of their argument that there aren't sufficient findings of fact.

THE COURT: I don't understand what you mean when you say you don't accept their premise that the report is not completed. I don't want to be in a position here of talking about apples and bananas. Let's assume there is a complete report by the regional office, and that report has been submitted to the Commission but has not yet been considered by the Commission, it has not yet been acted on by the Commission, and certainly has not yet been adopted as the Commission's report.

Is that not an intra-agency memorandum?

MR. MARSHALL: No, it is not.

THE COURT: Why not?

MR. MARSHALL: That is not a memorandum from one person to another involving a decision-making process. What the SEC --

THE COURT: Of course it is involving the decision-making process. Mr. Moran can't make a decision binding the Commission. Only the Commission, five members of the Commission, can do that.

MR. MARSHALL: But when you read the case law, your Honor, as I did last night, you will see that courts up to the Supreme Court make a distinction between correspondence between people within an agency as to what they are going to do with respect to an investigation -- any correspondence that would reveal, inhibit someone from expressing an opinion so that they can talk to each other uninhibited by public scrutiny -- they draw a distinction between that type of intra-agency memorandum with the fruit of the investigation, and the Court sifts out that which would reflect the decision-making process within the agency and will correctly withhold that disclosure but will order the disclosure of the fruit of the investigation. And it is that which we seek by this application to this Court.

THE COURT: Give me an example of what you mean as the fruit of the investigation which is disclosable within the framework of paragraphs 5 and 7.

MR. MARSHALL: I will draw upon, for example, information that came out of the state Banking Commission report which the chairman of the state Banking Commission in Albany told me was transmitted to the SEC.

In the state Banking Commission report a factual finding, a fruit, is that for a month or two before public disclosure that the city was bankrupt or unable to pay whatever obligations on bonds it was offering for sale to the public that various city officials within the City of New York were using the term "bankrupt" and "insolvent" with respect to the city's finances.

Certain groups which Mr. Pitt mentioned -- underwriters, banks -- that were offering securities for sale to the public were also using in meetings the term "bankrupt" and "insolvent."

Yet, nevertheless, they were offering bonds to the public without the public being aware as to the true state of the city's finances.

That, to me, your Honor, is a fruit of the investigation. That, to me, is a factual finding by the SEC -- or in this case by the state Banking Commission, who turned the information over to the SEC eight or ten months ago.

THE COURT: Isn't that available to you from the state banking agency?

MR. MARSHALL: The state banking agency is only one of hundreds or maybe thousands that they interviewed. They got information from the state banking agency, but they don't give their information to the state banking agency.

Very early in their investigation, January or February, they interviewed Mr. Harnett, chairman, City Club. I wasn't there, so I am not going to say to the Court what they asked him and what he responded, but there is a detailed interview with Mr. Harnett as chairman of the City Club.

THE COURT: In other words, as an observer and not an actor?

MR. MARSHALL: I don't know what his capacity was, but whatever he said if it were factual would be a fruit of investigation.

Drawing the distinction your Honor asked for, if Mr. Moran or Mr. Jacob would write to Mr. Williams, or anyone, or to Mr. Pitt, and say "We now know there are individuals in the government, individuals in the securities or banking industry, that used the word "bankrupt" or "insolvent" to describe the city's affairs, what are we going to do about it, what position is the SEC going to take with respect to that, and there is discussion back and forth as to what they are going to do, whether there will be an enforcement proceeding, whether there is no violation of any law because no law exists to prohibit it -- I am stating this as a hypothetical argument -- that discussion between Mr. Moran, Mr. Jacob and Mr. Williams, should not be disclosed, that decision-making process as to what the SEC is going to do with the facts that their investigative team has accumulated, but the public is entitled to the facts,not how they decide what they are going to do with the facts.

Congress in its wisdom has provided that where an investigation such as this -- not that they specifically related to an investigation going on eighteen to twenty months -- is involved there has to be some other mind brought into the situation to sift the decision-making process from the facts. And that is why we are before your Honor this morning, because Congress in its wisdom has said it isn't enough for the agency to determine what should or should not be released, it isn't enough for the agency to say there is a blanket exemption.

I have not heard the agency argue that these exemptions are qualified and strictly limited, as your Honor has correctly pointed out. Although there are five or six subdivisions to exemption 7, they are very narrow. I haven't seen the SEC report, but I would suspect it would apply to maybe three to five percent of the report. That is why Congress said that the federal district court has original jurisdiction, has original jurisdiction to determine the matter de novo, from the beginning.

Now, it is their responsibility as an agency of the government to bring, pursuant to your order, all of the material they have. It is semantics whether you call it complete, or intra-agency correspondence, or what. It is for your Honor to determine what should or should not be released. I will be satisfied with your decision. It is for you to determine. That is what Congress said. Congress gives this great importance, and it says this case, or a case like this, has precedence over any other case in the court, except if the Court determines other cases might be more important.

THE COURT: I have not yet figured out what that means.

MR. MARSHALL: I am merely quoting what the Act says. We are here today, and I am satisfied. The point I want to make, yourHonor, is that inter-agency under exemption 5, or intra-agency memos or letters which would not be available by law to a party, that is not saying not available; it says only those memos which would not be available to a party. They haven't made any showing that a single document they have accumulated since January 1976 would not be available to a party -- that would not be available by law to a party -- relates to a decision-making memo between Mr. Jacob and Mr. Moran.

They can't take a blanket phrase, inter-agency memo, and apply it to the whole fruit of their investigation.

I would also like to give you the basis why I don't buy their argument the report has not been finished. I met with Mr. Moran, Mr. Harnett, and a reporter from the Daily News, about a month and a half ago in Mr. Moran's office, and Mr. Moran told us then that the report has been completed, it has just a little more to go, some polishing up, and that he was going to get it out of his office within a couple of weeks.

When I read the article by Mr. Tulchin -- of course, I am not privy to what the SEC is doing that Mr. Williams, the chairman, said to Mr. Tulchin -- that the report of Mr. Moran had been delivered in Washington a week ago last Friday, I am willing to put that in an affidavit, willing to subpoena Mr. Tulchin to come here and testify, I think at the least we should have a hearing where Mr. Williams sits on the stand and denies a report from the regional office was delivered a week ago last Friday.

Why would he tell Mr. Tulchin that it was? It is not a matter of disclosing a source. There has been from various sources, your Honor, sufficient information, sufficient comments from the press, to indicate that the report or the factual aspect of the report has been completed. If they want to take another year or two to decide what to do about it, that is their privilege, but the people should not be deprived of the facts that they should know before they exercise their franchise to vote, and I am relying on your Honor to carry out the intention of Congress and insist that they comply by bringing to this court and turning over to you in camera whatever they have.

Don't tell me -- I am not talking to you, this is a figurative statement -- don't tell me the SEC can't get copies of what they have, and merely because you are looking at something in camera the whole works of the SEC stops. I don't buy that for a minute, and I don't think anybody would seriously buy it, either.

I would like to point out under exemption 7 it is very well qualified, as you pointed out. Exemption 7 says "investigatory records compiled for law enforcement purposes." I have read their briefs, everything they have submitted. For the first time, in Mr. Pitt's oral statement, he used the words "law enforcement purposes."

Nowhere in any of the memoranda is that phrase used. When they discuss exemption 7 in their papers they refer to investigative purpose. Nowhere in writing have they claimed it is for enforcement purposes. "Investigative purpose" is not covered by exemption 7.

THE COURT: Well, 7 pertains to investigatory records compiled for law enforcement purposes.

MR. MARSHALL: They in their written papers don't say that this was compiled for law enforcement purposes. They say it was compiled for investigative purposes. I don't think it is a typographcial error.

But, furtheer, if it were for enforcement purposes, and if they found wrongdoing, and if they feel there should be prosecution, fine, I am all for that. I don't want to interfere with that or interfere with the rights of any defendant to a fair trial, and I don't want people tried in the press. But with the speculation, that is what is happening.

Mayor Beame, for example, is being crucified in the press by speculation as to whether there is going to be a criminal prosecution against him or not, or whether he is going to be named as having done something wrong or not. In fairness to him the report should come out before the election so that if he is cleared at least he has that going for him.

But, further, exemption 7 says that even if it is an investigatory record compiled for law enforcement purposes, the SEC has to show -- and the case law says by affidavit or oral testimony under oath, not merely a naked assertion in a brief which has no probative value -- they have to show that it would interfere with enforcement proceedings.

There is a case, a Marathon case, page 30 -- I will give you the citation in a moment, or put it in my brief -- which says the exemption protects investigatory records compiled for law enforcement purposes where there exists concrete prospective law enforcement proceedings --

and the law places a burden on the agency claiming such exemption to prove to the court by appropriate means, which may include in camera inspection, that the claim of exemption is well-founded.

Now, they haven't done that. I am referring to Marathon against NLRB, 414 F. Supp. 404.

This record is devoid of any sustaining of any burden that the law imposes on the SEC to claim an exemption. Mr. Moran's affidavit only says he didn't deliver the complete report. He didn't say he didn't deliver nine-tenths of it or all of the factual part of it but maybe some recommendation.

If it is the intention of the SEC not to release the report until sometime in September, then all they have to say is "Play around with the word 'complete,' which is a matter of subjective interpretation."

I am reminded that Mr. Tulchin in his article -- I wasn't there when Mr. Williams said it to him -- Mr. Tulchin in his article said Mr. Williams has made a commitment -- and he has been chairman, I believe, for three months now -- that the report would be released -- whatever the burden upon the employees in the Commission, that the report would be released by the end of the summer.

Now, summer ends something like September 23rd or September 21st. It seems to me not to be terribly difficult to get the report out by August 21st or August 10th. Why release it after the people should know who did what to whom and when and now? Why keep the public in the dark? Why must the SEC by the Con Ed of this week? Where Con Ed had the public in the dark last week, why should the people be kept in the dark this week about the facts? The public policy is that the public be informed, not thatthe public be damned. And that is what is happening, it seems to me.

They have not demonstrated by a scintilla of evidence that any exemption should be applied, and I think they are in contempt of your order, although I don't know that because I haven't heard whether they brought anything to Court, by not bringing what you ordered them to bring.

I would like to mention for the record Mr. Neil Goldman is in the courtroom, an attorney for the New York Post, who has not made any determination as to whether the New York Post wants to intervene in the public interest or file as amicus curiae. I am not authorized to speak for him, but he authorized me to say he was here. He may want to address your Honor with respect to needing time, after he has seen the papers.

THE COURT: I just want to say, Mr. Marshall, that my thought was that the SEC or the Executive Office of the President, whichever one of them has possession of the complete securities report relating to state of municipal bonds and securities, bring that report to court.

Mr. Pitt has told us that there is no such complete report. And so in my judgment neither the SEC nor Mr. Pitt is in contempt for not bringing a report that does not exist.

MR. MARSHALL: Here we are with the word "complete" again.

THE COURT: That is what the order to show cause asked for, and with all due respect you drafted it.

MR. MARSHALL: That's right. Then I would move to amend the order to show cause and ask the Court from the bench to submit an order, since they say it is not complete, that they be directed to bring to your Honor whatever they have.

As your Honor asked Mr. Pitt correctly during his argument, since Congress has vested in your Honor the obligation to determine what should or should not be released, and whether it is in shape to be released, I don't think it is proper for your Honor to accept an oral statement by Mr. Pitt as to the status. I think Congress intended for your Honor to see what it is we are talking about and whatever stage it is, and I am sure furnishing your Honor copies of whatever exists is not going to hamper the SEC.

The SEC business is to give tremendous informatio every week, and it continues to operate. The SEC insists on full disclosure from the businesses under its jurisdiction. I think we can ask the SEC no less with respect to this matter of public interest.

This is a matter which all the major newspapers of the City of New York -- the Post, News, and the Times this morning -- have commented on in editorials that are in agreement, which is unusual, that whatever exists should be released provided it doesn't affect the right of any prospective criminal defendant. But it is for your Honor to see whatever material they have, and Congress wants your Honor to make the determination, not Mr. Pitt and Mr. Williams.

THE COURT: Or the newspapers.

MR. MARSHALL: I only submitted editorials, your Honor, so you would be apprised on the record --I am sure you read the papers as I do -- as to what the feeling is in the press, which represents some public opinion in this city, as to what should or should not be done with respect to what is probably the most important issue facing the City of New York at this time.

I won't belabor making oral argument with respect to the inapplicability of the various, the two exemptions Mr. Pitt is claiming. There are various citations that the balancing of the equities is presumptively on the side of disclosure. I will give citations for all these quotations from the cases. The agency must meet the burden by more than blanket and conclusory assertions, which is all they have done so far.

There was one case in which the Court said that the government's commission was woefully inadequate to sustain any finding by the Court in favor of granting the exemptions, and I think their presentation here today without any statement under oath and affidavit as to anything they claim an exemption on is woefully inadquate.

I urge the Court, in response to what you said that they may not be in contempt, to direct them here and now to bring to court to your Honor whatever it is that exists with respect to the investigation for your Honor to examine and determine what should be done about it in camera. And if your Honor feels that there should be a hearing with Mr. Williams testifying, or any witnesses that I could produce, or Mr. Moran, under oath, as to what is the actual status of this report and whether the factual fruits of the report has been completed and that should be released. Then let the SEC take their time on what they want to do about it.

I am not as much interested at the moment in what they want to recommend, but we should know what they found out. Were there meetings where the words "bankrupt" and "insolvent" were used? Did there come a time when they decided not to keep minutes of the meetings because the minutes would have revealed some frank discussion about the sorry state of the city's state of financial affairs and nobody wanted to be quoted. And under what facts and circumstances was the budget drawn, and what figures are in the budget that was presented to the people upon which they relied when they bought the bonds as to whether the city could meet its obligations?

The point has been made if a businessman sold his bonds or his stocks or securities based on the financial information the city disclosed they would be out of business by order of the SEC. The people of the City of New York, in the most critical time of the history of the city, have a right to know before they designate who would have various designations for various parties who would be in the general election in November. The parties are designating September 8th. I shudder to think that someone should receive a designation in any of the political parties and then should be found out to have been terribly culpable with respect to the sale of securities and financial matters of the city. Then it is too late.

I don't think that a city which has suffered so much can stand an impeachment or voting someone out of office. It is tough enough to get someone elected. I am not making a political argument. I am making a public policy argument

Congress has declared facts should be disclosed, and the cases are very clear, your Honor, that you have the power, authority, and obligation, to segregate that which should be exempt, but to order the immediate release of that which is not exempt.

THE COURT: You may not be making a political argument, but the SEC has certainly alleged that this entire action that you brought, certainly your order to show cause, is politically motivated.

MR. MARSHALL: That is what they have alleged.

THE COURT: Is there any question about it?

MR. MARSHALL: Your Honor, I cannot deny one of the plaintiffs is a candidate for mayor, but I can assure this Court we have not brought this action to seek publicity. We have brought this action to seek the disclosure of the SEC report.

Mr. Harnett, before he ever considered being a candidate for mayor, was chairman of the City Club for seven years, and has been outspoken on the affairs of the city,and is probably one of the best informed persons as to the issues facing the city and problems facing the city.

I cannot divorce myself from the reality that he is a candidate for mayor, but that should not, because he is a candidate for mayor, and because he is the only person who has taken action to get the report released, inure to his detriment or to the detriment of the people of the City of New York's right to know.

Mr. Harnett is not writing letters to Mr. Beame, "Tell the SEC to release the report," or making wild and irresponsible charges, as other candidates have done.

Yes, your Honor, I cannot divorce myself from the fact that he is a candidate, and that there is a primary campaign going on. But that is not one of the exemptions. Congress didn't say that someone who is a mayoral candidate is not authorized to bring this proceeding, and I don't think it should color your thinking. Yes, he is a candidate, but he is also a citizen, as am I, and I am not a candidate, and we have a right to know what facts have been disclosed.

I don't know what the investigation has cost. I am sure if they claim my little motion which was started last Thursday has so burdened the SEC staffwise and economically, I can only guess what the SEC investigation since last January has cost. And why should that cost, probably in the millions of dollars, be wasted by being released after the people make a judgment as to the people who are in this election? At least let the people benefit by all of the work that the SEC has done.

THE COURT: Thank you, Mr. Marshall.

Let me hear from you, Mr. Pitt.

MR. PITT: Your Honor, a few points.

I think the affidavit of Mr. Moran is the affidavit that Mr.Marshall is talking about. It indicates that this is an active investigatory matter that was commenced for law enforcement purposes. We have submitted an affidavit. Mr. Marshall may be unfamiliar with the Freedom of Information Act, but the cases that we cited to your Honor make it clear -- the New England Medical Center case, the Safeway case, the Sears Roebuck case,make clear several things. In camera inspection was not mandatory, and the First Circuit and the courts have held that the court should not feel constrained to employ that kind of an approach where it would be unworkable and would create an inflexibility and hamper the agency in continuing the very processes underway.

I commend to your Honor's attention the New England case and the Safeway case, which deal with virtually an analogous situation where a report was complete and summarized factual matters that had been adduced in public, and yet the court properly held even those summaries were analyses which the commission either took or didn't take action on.

Finally, I suggest to your Honor that the Supreme Court's decision in the Sears Roebuck case is terribly critical because it talks about pre-decisional memoranda. What it effectively suggests is that when an agency has before it a memorandum which is the predicate for an agency deciding whether to take action that is exempt under exemption 5 under the Freedom of Information Act.

The Supreme Court has ruled on it, I think the issues are quite clear notwithstanding Mr. Marshall's discussion.

With respect to exemption 7, our memorandum does indicate that the exemption was changed in 1974 to hbmd

to make clear that the exemption only applied where there was an ongoing law enforcement investigation, and our memorandum states that that is the situation here.

I suggest that page 7 of our memorandum does allude to that distinction between the '74 amendments and the situation in this case. The Commission is not trying to be coy or clever about its wording. I suggest to your Honor the facts are very simple. Mr. Marshall has come into this courtroom seeking a complete report. There is no complete report. He is seeking part of a report. Portions of that report haven't even been written.

THE COURT: I think he is willing to settle for the portions that have been written.

MR. PITT: The portions that have been writeen are in wholly draft form, are still being documented, still being put together at the staff level. After it has been reviewed by Mr. Moran, which he has not done, then it will be shipped to Washington, and the Commission will, at the completion of its efforts, release it.

I also feel constrained, your Honor, to point out that Mr. Marshall's suggestion that this is the most critical time in the history of the city of New York, or most critical election, seems to coincide with the fact that his client is running for mayor of this city. This case is hbmd

political because Mr. Harnett has made it political. There is no merit to this action.

THE COURT: Just one second, Mr. Pitt. He also made the point that there is no provision in the Freedom of Information Act that says because a man is a political candidate he is not entitled to information everybody else is entitled to. This case has to be decided whether under the Freedom of Information Act the material should or should not be made available. It really doesn't matter whether he is a political candidate.

MR. PITT: It does not matter as to the basic merits, which we contend and respectfully urge are fairly clear under the existing precedents. It does not matter as to that extent. Your Honor is correct, the matter must be decided on the merits. But it does matter why the case was litigated.

Mr. Marshall referred to a conference with Mr. Moran. There was no conference with Mr. Moran. Mr. Marshall and Mr. Harnett collared a Daily News reportere and showed up in the office. I have heard Mr. Marshall this morning indicate he didn't see the press release, but the plaintiffs in this case are his clients. He is responsible for them. They are all part of a single web. Mr. Marshall is Mr. Harnett's counsel, and apparently his biggest and most ardent political supporter.

This action was brought for political purposes, brought to get publicity. The press has been notified about the action, and I can assure your Honor neither I nor any member of the Commission staff have gone out seeking publicity.

MR. MARSHALL: Except the SEC chairman wrote a letter published in the New York Times this morning.

THE COURT: I understand it was a response.

MR. PITT: To the Tulchin articles upon which Mr. Marshall heavily relies.

We did not request attorneys' fees in this case lightly. This case is an abuse of the system, and the profession. This entire case is frivolous on the merits, and brought to gain Mr. Harnett some publicity. It apparently has succeeded, and we urge an end be made to it. We urge the case be dismissed. We urge we be granted summary judgment alternatively on the basis of our exemptions in response to the Court's order to show cause, and strenuously urge attorneys' fees be awarded.

We think this case should be an example that the processes should not be abused.

MR. MARSHALL: I don't know if your Honor wants to hear Mr. Goldman of the New York Post.

THE COURT: No, I don't.

Mr. Marshall, do you want additional time to get papers in in response to the motion?

MR. MARSHALL: Your Honor, I would like 48 hours to get some case law to your Honor with response to the exercise of exemptions and failure to meet the burden.

I would also like to reiterate my request, which you can act on now or at some time shortly, that the SEC be directed, in order to assist the Court, to furnish to the Court copies of everything they have with respect to their factual investigation as to the affairs of the City of New York so the Court can examine those documents in camera as well as the order of investigation, which has been submitted to you during argument.

I know your Honor was inclined to sign the order to show cause to direct they bring to you a complete report. I think it should be for your Honor to determine the applicability --

THE COURT: I want to make that very clear. I changed the order to show cause that you submitted to me from "deliver" to "bring." I had not made any decision that that should be delivered to me.

MR. MARSHALL: I understand.

THE COURT: I changed it in other respects as well, as you know.

You have 48 hours to get in responsive papers.

Mr. Pitt, I would request that the SEC consider this hearing, consider the various matters that have been discussed at this hearing, and the SEC will also have 48 hours to get in any further papers which they wish to submit. I am not going to issue a direction to the SEC to submit the papers that do exist in camera, but I request that as a result of the discussion here that you consider whether you wish to submit them in camera or whether you wish to submit any further papers which will delineate in a little more detail than you have so far the reasons why the exemptions under subparagraphs 5 and 7 should in your opinion be available to the SEC.

Maybe in connection with that you will wish to submit the documents we are talking about in camera. I am not at this stage going to make a direction to that effect.

MR. PITT: I appreciate that, your Honor.

Two clarifying matters, if I may. First, will we have any opportunity to respond to Mr. Marshall? I am not sure it will be necessary.

THE COURT: Each of you has 48 hours to get in additional papers and then each of you will have 24 more hours to get in any response to papers you wish. Is that clear?

You have a very competent staff here in New York and --

MR. PITT: We will attempt to adhere to your Honor's schedule.

MR. MARSHALL: May I be limited from now on in serving the U. S. Attorney here in New York?

THE COURT: I would think that would be the most convenient arrangement.

MR. MARSHALL: And Mr. Moran's office --

THE COURT: Is that satisfactory, Mr. Jacob, Mr. Pitt?

MR. PITT: That will be fine, yes.

MR.MARSHALL: I can dispense with the Attorney General --

THE COURT: I would say the U. S. Attorney and the SEC regional office.

Thank you, gentlemen.

GORDON MARSHALL
ATTORNEY AT LAW

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July 26,1977

BY HAND

Honorable Vincent L. Broderick
United States District Court
Foley Square
New York, New York

Re: Joel Barnett, et al
vs. Securities and Exchange Commission, et ano

Honorable Sir:

I enclose a copy of the press release which was issued by Save Our City, Inc. on July 22,1977 without my knowledge, consent nor approval.

I had sent a copy of the order to show cause to my client so that my client would know as to the progress in the case. The press representative wrote the press release and distributed it to various media people with a copy of the order to show cause attached in each instance.

I had not seen the press release until it was delivered to me today for transmittal to you.

Pursuant to my commitment to you in court today, I am delivering it to you by hand and am mailing a copy of this letter and the enclosure to the United States Attorney and to the SEC New York regional office.

Respectfully yours,

gm/fds
enclosure

BEST COPY AVAILABLE

Save Our City with JOEL HARNETT as Mayor
SAVE OUR CITY, INC., SUITE 2703, 575 LEXINGTON AVE., NEW YORK, NY 10022
(212) 688-4545

FOR IMMEDIATE RELEASE

RESPONDING TO JOEL HARNETT'S REQUEST, FEDERAL JUDGE VINCENT BRODERICK ORDERS THE SECURITIES AND EXCHANGE COMMISSION TO BRING TO COURT ITS CONTROVERSIAL REPORT ON THE SALE OF NEW YORK CITY SECURITIES

Judge Vincent Broderick, responding to an Order to Show Cause filed yesterday by Mayoral Candidate Joel Harnett, ordered the Securities and Exchange Commission to bring its controversial report on the sale of New York City Securities to court on July 26, Tuesday, Room 318, 10 A.M.

Broderick, a Federal Judge of the U.S. District Court, also asked Harnett to notify the following to be represented in court:

The Office of the President of the United States
The Securities and Exchange Commission
The U.S. Attorney in New York City
The Attorney General in Washington, D. C.

Harnett, under the Freedom of Information Act, filed a lawsuit against the Office of the President and the SEC asking for release of the report on June 27, 1977. Yesterday, Harnett asked the Court, in view of leaks to the press saying the report is complete, to order the SEC to produce the report and show cause why it should not be released.

The Judge agreed to hear argument next Tuesday.

July 22, 1977

(Attached is copy of Judge's Order)

filed VLB 12:10 pm 7/28 JPS
filed CLK 12:15 pm 7/28 JPS

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, *et al.*,
Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, *et al.*,
Defendants.

77 Civ. 3110 (VLB)

SUPPLEMENTAL RESPONSE OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION TO THE ORDER TO SHOW CAUSE ENTERED BY THE COURT ON JULY 22, 1977, AND IN SUPPORT OF ITS MOTION TO DISMISS

HARVEY L. PITT
General Counsel

PAUL GONSON
Associate General Counsel

JAMES H. SCHROPP
Special Counsel

JOHN P. SWEENEY
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

WILLIAM D. MORAN
Regional Administrator
New York Regional Office
Securities and Exchange
Commission
New York, New York 10007

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL BARNETT, et al.,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants.

77 Civ.-3110 (VLB)

SUPPLEMENTAL RESPONSE OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION TO THE ORDER TO SHOW CAUSE ENTERED BY THE COURT ON JULY 22, 1977, AND IN SUPPORT OF ITS MOTION TO DISMISS

Preliminary Statement

On July 22, 1977, this Court entered an order, pursuant to a motion by the plaintiffs on July 21, 1977, directing the defendant Securities and Exchange Commission (the "Commission") to show cause why an order should not be entered directing that "the report of the Securities and Exchange Commission, including but not limited to the report of the New York Regional Office of the Securities and Exchange Commission," be produced and delivered to the Court for *in camera* inspection to enable the Court to determine whether that report or any part thereof should be released pursuant to the Freedom of Information Act (the "FOIA"), 5 U.S.C. 552.

On July 26, 1977, at 10:00 a.m., the Court heard arguments of the parties on the order to show cause, as well as on the Commission's motion to dismiss for failure to pursue their administrative remedy. The Court then directed the parties to file supplemental papers by Thursday, July 28, 1977, and any papers responding thereto by Friday, July 29, 1977. Pursuant to the Court's direction, this memorandum is submitted to supplement the Commission's previous response to the Court's order to show cause, as well as the Commission's motion to dismiss.

Although this memorandum is submitted primarily to supplement the Commission's previous discussion of Exemptions 5 and 7(A) of the FOIA as they relate to the draft materials in question, the Commission wishes to reiterate, at the outset, the prematurity and inappropriateness of this action. The plaintiffs instituted this action solely under the FOIA (Complaint ¶5), and proceeded by way of an extraordinary motion to show cause without first affording the defendants an opportunity to file a responsive pleading to the complaint—all without having bothered to present a request under the FOIA to the Commission. Accordingly, as we have previously discussed in the memorandum in support of the Commission's motion to dismiss, this action should be dismissed because the plaintiffs have failed either to pursue or exhaust their administrative remedies.

The Commission further urges that if the Court should permit this suit to proceed at all, the subject matter of the suit should be limited to the portions of the draft report which are in existence at the present time. Even if the plaintiff Marshall's exchange of letters with the Commission's General Counsel (set forth in the complaint) could be construed as a request under the FOIA—and the Commission does not believe it fairly can be so read—the only record sought in those letters was a completed report of investigation. Accordingly, plaintiffs cannot broaden Mr. Marshall's request at the litigation stage by seeking access, as requested in the complaint, to all investigatory records relating to the matter of the New York City investigation.

Discussion

I. THE DRAFT PORTIONS OF THE REPORT OF INVESTIGATION OF THE STAFF OF THE COMMISSION ARE EXEMPT FROM PRODUCTION UNDER THE FOIA.

Draft material relating to the Commission's City of New York investigation is exempt from compelled production under the FOIA. As we have previously noted, the staff of the Commission is diligently working on a report, to be forwarded to the Commission's headquarters 1/ but at this time, there exist only draft pieces of such a report in various stages of completion. This material is exempt from compelled disclosure under the FOIA exemptions for inter- and intra-agency memoranda and for investigatory records the disclosure of which would interfere with actual or potential law enforcement proceedings. 5 U.S.C. 552(b)(5) and (7)(A).

A. The Draft Portions of the Report of Investigation are Exempt Since They are "Investigatory Records Compiled for Law Enforcement Purposes," Disclosure of Which Would "Interfere with Enforcement Proceedings." 5 U.S.C. 552(b)(7)(A).

The FOIA reflects a deliberate attempt to effect broad disclosure of records relating to governmental activity, but without impairment of necessary governmental functions, including the law enforcement function. The seventh exemption of the FOIA excludes from that Act's coverage "investigatory records compiled for law enforcement purposes," and production of such records cannot be compelled under the FOIA to the extent that such disclosure is likely, inter alia, to "interfere with enforcement proceedings * * *." 5 U.S.C. 552(b)(7)(A). There is thus a significant difference under the FOIA between the status of investigatory records after law enforcement action has been concluded, and the status of such records when, as here, the investigation in which such records were compiled is still pending, and when, therefore, the Commission has yet to determine whether, and against whom, to institute law enforcement proceedings of any type.

1/ See affidavits of William D. Moran, dated July 22 and 28, 1977, and filed herein.

The legislative history of the FOIA, when originally enacted, emphasized the risk of an adverse effect upon prospective adjudicatory proceedings as the principal reason for the seventh exemption. The Senate Report explained that the disclosure of such files, "prepared by Government agencies to prosecute law violators," "* * * could harm the Government's case in court." 2/ Based on this history, while there never was any question that "active" enforcement files were exempt, some courts had expressed the view that disclosure was required after litigation was concluded and there was no prospect of further enforcement action. See, e.g., Bristol-Meyers Co. v. Federal Trade Commission, 424 F.2d 935 (C.A. D.C.), certiorari denied, 400 U.S. 824 (1970). After the Court of Appeals for the District of Columbia Circuit in Weisberg v. United States Department of Justice, 489 F.2d 1195 (C.A. D.C., 1973) (en banc), certiorari denied, 416 U.S. 993 (1974), overruled the view it had earlier articulated in Bristol-Meyers, and held that the exemption applied indefinitely to investigatory files as a whole, the Congress amended the exemption to its present form. See Pub. L. 93-502, 88 Stat. 1561 (Nov. 21, 1974). But, the legislative amendment, and its history, only serves to emphasize the necessity of protecting records relating to ongoing investigations from premature, compelled disclosure prior to the completion of enforcement activities.

The amendment was not intended to introduce an era of "open" investigations in which, prior to the completion of enforcement proceedings, the public (as well as persons suspected of having violated the law) 3/

2/ S. Rep. No. 813, 89th Cong., 1st Sess. p. 9 (1965); see also H.R. Rep. No. 1497, 89th Cong., 2d Sess. p. 11 (1966).

The Senate Report also noted that it is "necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." S. Rep. No. 813 at p. 3.

3/ Plaintiffs herein are, of course, not the subject of the Commission's investigation in the matter of the City of New York. But, the FOIA does not distinguish between categories of requestors;

(footnote continued)

would have the right to know the nature and extent of the information which enforcement authorities have obtained in the course of an investigation. The legislative history demonstrates that the purpose of the drafters of the amendment to the seventh exemption was to reassert, as one of the concepts underlying the original enactment of that exemption, that investigatory records need not be disclosed where to do so might interfere with the government's enforcement proceedings through the premature release of evidence. 4/ In introducing the amendment on the Senate floor, Senator Hart made his purpose clear:

> "My reading of the legislative history suggests that Congress intended that this seventh exemption was to prevent harm to the Government's case in court by not allowing an opposing litigant earlier or greater access to investigative files than he would otherwise have.
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> "Recently, the courts have interpreted the seventh exemption to the Freedom of Information Act to be

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3/ (continued)

thus, if the records were required to be made available at this time to the requestors, they would have to be made available to "any person" seeking access to them under the Act. 5 U.S.C. 552(a)(3). The "interference" that would result from disclosure to the subjects of potential law enforcement actions is too plain to require elaboration.

Moreover, the plaintiffs themselves have indicated that wide public dissemination of any information they receive as a result of this action can be expected. As indicated infra, the premature publicity that would be engendered for the Commission's investigation would result in other forms of interference for the Commission's future law enforcement efforts.

4/ The amendment to the seventh exemption was introduced by Senator Hart during the floor debate in the Senate on May 30, 1974. Neither the bill initially passed by the House (H.R. 12471) nor the bill considered and reported on by the Senate Committee on the Judiciary (S. 2543) would have amended this exemption. Accordingly, the legislative history of the amendment consists of the Senate floor debate on S. 2543 and H.R. 12471, 120 Cong. Rec. S9310-S9342 (May 30, 1974), the Conference Report, H.R. Rep. No. 93-1380, 93rd Cong., 2d Sess. (1974), the Senate and House debate thereon, 120 Cong. Rec. S17828-S17830 and S17971-S17972 (October 1, 1974), H10001-H10009 (October 7, 1974), and the Senate and House debate on the President's veto, 120 Cong. Rec. H10705-H10706 (November 18, 1974), H10864-H10875 (November 20, 1974) and S19806-S19823 (November 12, 1974).

> applied whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes—a stone wall at that point. The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made.
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> "That, we suggest, is not consistent with the intent of Congress when it passed this basic act in 1966."

120 Cong. Rec. S9329-9330 (emphasis added). Senator Hart continued, making it clear that the status of active investigatory matters was not to be affected by the amendments to Exemption 7:

> "*Then as now*, we recognized the need for law enforcement agencies to be able to keep their records and files confidential where a disclosure would interfere with any one of a number of specific interests, each of which is set forth in the amendment that a number of us are offering.
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> * * *
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> "Let me clarify the instances in which nondisclosure would obtain: First, where the production of a record would interfere with enforcement procedures. This would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. *This would apply also where the agency could show that disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding*." 5/

In light of the foregoing, it seems clear that, in amending the seventh exemption, Congress specifically meant to overrule the decisions holding that records properly classified as "investigatory" are exempt forever, but to continue to protect *bona fide* investigatory records from disclosure under the FOIA until the completion of law enforcement proceedings (except to the extent they might otherwise be available through discovery

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5/ 120 Cong. Rec. S9329-9330 (emphasis added). This legislative history thus refutes the plaintiffs' contention, at oral argument, that Exemption 7(A) is not available because the Commission does not presently have any law enforcement proceeding pending. The exemption, as common sense requires, was intended to protect as well the investigation that precedes the institution of formal enforcement proceedings.

procedures). This purpose was recently recognized by the Court of Appeals in *New England Medical Center Hospital* v. *National Labor Relations Board*, 548 F.2d 377, 382 (C.A. 1, 1976), which stated:

> "There is solid evidence in the legislative history that the sponsors of the 1974 Amendments acknowledged the right of an investigative agency to avoid the possible harm to a prospective law enforcement proceeding that might occur through 'premature release of evidence or information not in the possession of known or potential defendants.' 120 Cong. Rec. 17033 (remarks of Sen. Hart)."

Accordingly, the court concluded that forcing the premature release of active investigatory records "would come within this recognized category of interference" by "threaten[ing] the agency's ability to prosecute cases with dispatch." The Court of Appeals for this Circuit had previously agreed with this view in *Title Guarantee Co.* v. *National Labor Relations Board*, 534 F.2d 484, 491 (C.A. 2), *certiorari denied*, 429 U.S. 834 (1976). There the court agreed with the NLRB that a source of interference stemming from premature disclosure of investigatory records would be the opportunity that would thereby be afforded suspected violators to "frustrate the proceedings or construct defenses which would permit violations to go unremedied."

In a statement of the law directly applicable to the circumstances of this case, the court in *New England Medical Center*, *supra*, 548 F.2d at 383, held:

> "Exemption 7(A) applies whenever disclosure would 'interfere' with an enforcement proceeding, and it is difficult to conceive of a greater interference than one which would involve the courts in arbitrating the [agency's] control of what documents to retain and what documents to surrender immediately prior to an enforcement proceeding." [6]

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[6] *Accord*, *Title Guarantee Co.* v. *National Labor Relations Board*, *supra*, 534 F.2d 484; *Roger J. Au & Son, Inc.* v. *National Labor Relations Board*, 538 F.2d 80 (C.A. 3, 1976); *Goodfriend Western Corp.* v. *Fuchs*, 535 F.2d 145 (C.A. 1), *certiorari denied*, 429 U.S. 895 (1976); *Climax Molybdenum Co.* v. *National Labor Relations Board*, 539 F.2d 63 (C.A. 10, 1976).

As we noted in our initial response to the Court's order to show cause, it is indeed difficult to conceive of any greater "interference" that could result from the disclosure of investigatory records than the interference that would be visited upon the Commission's investigation, if disclosure of the records in issue were to be required at this most critical time. At this stage, the primary work being conducted by the staff of the Commission involves the weighing and evaluation of the evidence collected during a lengthy investigation. Affidavit of William D. Moran (July 28, 1977) ¶ 4. Eventually, the Commission will have to consider the report of the staff in order to determine what, if any, further action would appear to be required in the public interest and in the interest of investors in securities issued by the City of New York. As the annexed affidavid of the Commission's Regional Administration makes clear, the premature release of the report would not only detract from the Commission's ability to finish the report on a timely basis, it could affect the quality of the report as well. Premature disclosure could also prejudice the Commission's ability to prosecute successfully any law enforcement proceeding that might result by prematurely revealing the evidence in the Commission's possession; at a minimum, such disclosure would needlessly complicate and prolong any such proceeding by injecting issues relating to the possible infringement of the rights of those ultimately named in such proceedings. To disrupt the sensitive process now going on by the premature public release of any records relating to this investigation, even prior to the time that those records have been received and considered by the Commission itself, could only prejudice the Commission's obligation to complete its law enforcement efforts.

B. The Draft Portions of the Report of Investigation are Part of an Internal Memorandum which is Exempt From Disclosure Under the FOIA, 5 U.S.C. 552(b)(5).

We submit that Exemption 7 provides a complete exemption for all of the material in the Commission's investigatory file, and no further exemption in the FOIA is necessary. But, in fact, Exemption 5 is also applicable here. A report of investigation is an intra-agency memorandum which qualifies for the protections afforded such records by Exemption 5. Kent Corp. v. National Labor Relations Board, 530 F.2d 612 (C.A. 5, 1976); Safeway Stores, Inc. v. Federal Trade Commission, 428 F. Supp. 346 (D. D.C., 1977). In this regard, it is important to distinguish raw investigative materials from a report of investigation: the former is the evidence collected in the course of the Commission's investigation—the "facts;" the latter is the staff's selection, compilation, analysis, distillation and discussion of the relevant facts, those facts that tend to show the presence or absence of violations of the federal securities laws. The disclosure of a report of investigation would necessarily disclose the reasoning process and rationale of the authors of the report and, for this reason, such reports have been held to be exempt under Exemption 5 in their entirety. 7/

In enacting the Freedom of Information Act, Congress included an exemptive provision for inter-agency or intra-agency memoranda which is designed to meet the problems which would be created if internal communication within an agency were needlessly inhibited. 5 U.S.C. 552(b)(5). The legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule, applicable in a discovery

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7/ See, e.g., Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975); Kent Corp. v. National Labor Relations Board, 530 F.2d 612 (C.A. 5, 1976); Brockway v. Department of the Air Force, 518 F.2d 1184 (C.A. 8, 1975); Montrose Chemical Corp. v. Train, 491 F.2d 63 (C.A. D.C., 1974); Safeway Stores, Inc. v. Federal Trade Commission, 428 F. Supp. 346, 347 (D. D.C., 1977);

context, that "confidential intra-agency advisory opinions * * * are privileged from inspection * * * ." *Kaiser Aluminum & Chemical Corp.* v. *United States*, 141 Ct. Cl. 38, 39, 157 F. Supp. 939, 946 (1958) (Reed, J.). 8/ As Mr. Justice Reed there stated:

> "There is a public policy involved in this claim of privilege for this advisory opinion--the policy of open, frank discussion between subordinate and chief concerning administrative action." *Id.* at 48, 157 F. Supp. at 946.

The importance of this underlying policy was echoed again and again during legislative analysis and discussions of Exemption 5. The House Report explains the exemption as follows:

> "Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and

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8/ Exemption 5 specifically refers to the civil discovery context, since it applies to memoranda "which would not be available by law to a party * * * in litigation with the agency." 5 U.S.C. 552(b)(5). The House Report on the FOIA says that Exemption 5 was intended to require disclosure only of those intra-agency memoranda which would "routinely be disclosed" in private litigation. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). The Supreme Court, in the two major cases construing Exemption 5, has recognized that "Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context." *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975). *Accord*, *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975). Thus, such privileges as the attorney-client and work product privileges are encompassed by Exemption 5. See *Hickman* v. *Taylor*, 329 U.S. 495 (1957).

The Supreme Court has also held that that the relevant criterion is whether the document in question would be available through the *civil* discovery process, rather than in a criminal discovery context, where "the private party's claim is most compelling." *National Labor Relations Board* v. *Sears, Roebuck & Co.*, *supra*, 421 U.S. at 149 n.16. In this connection, it is clear that, if the Commission instituted a civil injunctive action as a result of its investigation, the report of investigation would not be available through civil discovery, even to the defendant himself. *Securities and Exchange Commission* v. *National Student Marketing Corp.*, 68 F.R.D. 157 (D. D.C., 1975); *Sterling Drug, Inc.* v. *Federal Trade Commission*, 450 F.2d 698 (C.A. D.C., 1971); *International Paper Co.* v.

(footnote continued)

> the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fish bowl.'" 9/

As the President further observed on signing the FOIA into law, "Officials within Government must be able to communicate with one another fully and frankly *without publicity*." 10/

8/ (continued)

Federal Power Commission, 438 F.2d 1349 (C.A. 2, 1971). In *Securities and Exchange Commission* v. *Aldred Investment Trust*, 224 F. Supp. 626, 627 (S.D. N.Y., 1963), Judge Weinfeld, in refusing to allow certain discovery to the defendants, stated:

> "Neither does the Court agrees that the defendants 'are entitled to examine the material which was submitted to the Commission on the basis of which it authorized the institution of this action' * * *. Whether there is a need to institute an action is a matter for the Commission to decide * * *."

If the defendants in any action which the Commission may institute as a result of the New York City investigation could not obtain the report to the Commission, *a fortiori*, the report is not available to the plaintiffs herein, who cannot make out a need for, or right to, access greater than any other member of the public.

9/ H.R. Rep. No. 1497, 89th Cong., 2nd Sess. 10 (1966). *See also* S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

10/ Statement by President Johnson upon signing Pub L. 89-487 on July 4, 1966, reprinted in Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act (June 1967), p. ii (emphasis added).

As many courts, including the Supreme Court, have held, predecisional memoranda prepared in order to assist an agency decision-maker "in arriving at his decision are exempt from disclosure under the FOIA. Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168 (1975); National Labor Relations Board v. Sears, Roebuck & Co., 421 U.S. 132 (1975). In Grumman, the Supreme Court held that reports prepared by the regional boards and divisions of the Renegotiation Board, to be presented to the Board for a final decision as to whether certain government contracts provide for excess profits for contractors, and which contained detailed factual portions summarizing and analyzing information compiled in the course of the staff's inquiry, were just the sort of "predecisional memoranda prepared in order to assist an agency decision-maker in arriving at his decision" contemplated by the fifth exemption of the FOIA. Id. at 184. The Court reached this conclusion with respect to those reports

> "[b]ecause only the full Board has the power to make the decision whether excess profits exist; because both types of reports involved in this case are prepared prior to that decision and are used by the Board in its deliberations; and because the evidence utterly fails to support the conclusion that reasoning in the reports is adopted by the Board as *its* reasoning, even when it agrees with the conclusion of a report * * *." Id. (emphasis in original).

Similarly, the draft materials in question here are predecisional memoranda which may ultimately comprise part of the staff's report. The Commission will then determine, based upon the facts, analyses and recommendations presented to it, whether, and with respect to what parties, it is appropriate to pursue the various types of remedial relief provided for violations of the federal securities laws, as well as whether additional legislation or rules may be necessary. These draft materials, as well as the final staff report,

> "are thus precisely the kind of predecisional deliberative advice and recommendations contemplated by Exemption 5 which must remain uninhibited

> and thus undisclosed, in order to supply maximum assistance to the [agency] in reaching its decision." Id. at 186.

In Montrose Chemical Corp. v. Train, supra, 491 F.2d 63, the court held that a summary of evidence presented at public hearings was protected from disclosure by Exemption 5, since the summary had been prepared by staff members of the Environmental Protection Agency to assist the administrator of the agency in deciding whether to ban DDT. The court stated that the purpose of Exemption 5 was "to protect not simply deliberative material, but also the deliberative process of agencies," and that "[t]o probe the summaries of record evidence would be the same as probing the decision-making process itself." Id. at 68, 71. Just as was the case in Montrose, the "evaluation and selection of certain facts" by the staff of the Securities and Exchange Commission should not be disclosed in this case. Id. at 70. That is, however, what would necessarily occur as a result of any public disclosure of any portion of the draft material in issue. 11/

11/ A similar result was reached in Kent Corp. v. National Labor Relations Board, 530 F.2d 612, 624 (C.A. 5, 1976), where the court held reports of investigation exempt in their entirety, noting:

> "In our view, even the factual matters in these reports * * * are protected by the work-product privilege. Writing in contemplation of forthcoming unfair labor practice litigation, an attorney must be able not only to discuss doctrinal theories but also to 'assemble information, [and] sift what he considers to be the relevant from the irrelevant facts' without feeling that he is working for his adversary at the same time. Hickman v. Taylor, 329 U.S. at 511 * * *. The feeling would be well justified if we allowed the FOIA to be used to force disclosure of such materials."

See also Brockway v. Department of the Air Force, 518 F.2d 1184, 1193-1194 (C.A. 8, 1975), where the court held factual statements of witnesses compiled in a safety report on an airplane crash to be exempt in their entirety. The court indicated that its decision was in accord with the statement of the Supreme Court in National Labor Relations Board v. Sears, Roebuck & Co., supra, 421 U.S. at 151, that the purpose of the long-recognized privilege against disclosure of internal memoranda is "to prevent injury to the quality of agency decisions."

Thus, although it is to be expected that the final report to the Commission, as well as the material now at various stages of preparation, will contain summaries of the evidence uncovered during the Commission's investigation, such materials are protected in their entirety by Exemption 5, as well as by Exemption 7(A).

Even in its eventual final form, the purpose of a report of the Commission's New York Regional Office to the Commission will be to assist the Commission in determining what, if any, response to make to the facts uncovered during the New York City investigation. In its present condition, the draft material that ultimately might, after appropriate modifications, comprise parts of a final report, relate not only to recommendations that might eventually be made to the Commission, but to recommendations made, and expressions of views and opinions exchanged, among members of the staff of the New York Regional Office with respect to what form the report to the Commission should ultimately take. Such "deliberative materials" have always been held to be exempt from compelled disclosure. 12/

12/ *See, e.g.*, *Aspin* v. *Department of Defense*, 348 F. Supp. 1081, 1082 (D. D.C., 1972), *affirmed*, 491 F.2d 24 (C.A. D.C., 1973); *International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1349, 1358-1359 (C.A. 2, 1971); *Wu* v. *National Endowment for Humanities*, 460 F.2d 1030, 1034 (C.A. 5, 1972); *Ditlow* v. *Volpe*, 362 F. Supp. 1321, 1327 (D. D.C., 1973), *reversed on other grounds sub nom.*, *Ditlow* v. *Brinegar*, 494 F.2d 1073 (C.A. D.C.), *certiorari denied*, 419 U.S. 974 (1974).

In issue in *Safeway Stores, Inc.* v. *Federal Trade Commission*, 428 F. Supp. 346, 347 (D. D.C., 1977), a recent action arising under the FOIA, was a "170-page staff report culminating a non-public investigation of the retail food store industry," which had been "transmitted to the Commission and rejected." The agency's claim that the report was exempt pursuant to Exemption 5 was upheld, the court holding that an *in camera* inspection of the documents in question was unnecessary, since it was clear that the report was "involved in a predecisional deliberative process." Since reports to an agency by its staff are exempt from disclosure even after consideration of the completed report by the agency, *a fortiori*, the draft material here in issue is similarly protected against such disclosure.

The report of investigation currently in progress is a predecisional, internal memorandum, used in the process of determining what action to take as a result of the New York City investigation. The draft report consists, in its entirety, of "deliberative materials"— those facts selected by the staff as having particular significance, combined with expressions of the staff's opinions as to what those facts might show. There are necessarily no segregable portions that can, or should, be publicly disclosed at this time. Accordingly, the Court should find the draft report exempt, in its entirety, under Exemption 5 of the FOIA.

II. IN CAMERA INSPECTION IS NOT REQUIRED IN THE CIRCUMSTANCES OF THIS CASE, AND SHOULD NOT BE IMPOSED UNNECESSARILY UPON THE COMMISSION OR THE COURT

The FOIA provides that in any suit instituted under the Act seeking access to agency records, the court "may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld" under any of the Act's exemptive provisions. 5 U.S.C. 552(a)(4)(B) (emphasis added). The *in camera* inspection provision is permissive, and was intended to be utilized only where necessary. In this regard, speaking with particular reference to the *in camera* inspection provision, the Supreme Court has stated that a "flexible, common sense approach" to the FOIA should be adopted, an approach that is not "unnecessarily rigid." The court went on to indicate in that case, in the context of an Exemption 5 issue, that affidavits or even "surrounding circumstances" could, in an appropriate case, show that records met the requisite criteria for exemption. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 91-92 (1972). 13/

13/ In *Mink*, the Supreme Court indicated that a court should not compel disclosure of classified documents in order to sift out non-secret portions. The 1974 amendments to the FOIA overruled the Court on this point, by amending the Act to provide that *in camera* inspection of such records could occur when necessary, the same as

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In *New England Medical Center Hospital* v. *National Labor Relations Board*, *supra*, the court took note of this direction from the Supreme Court, and found that the application of this principle was particularly appropriate in an Exemption 7(A) context. Accordingly, in reaching the conclusion that the records there in issue were exempt, the court specifically held that an *in camera* inspection was unnecessary. In this regard, the court stated

> "the FOIA is sufficiently flexible to accomodate the agency's interest in swift and effective enforcement proceedings by allowing it to withhold certain information temporarily without close judicial oversight."

548 F.2d at 385. *14/*

As these cases indicate, there is a basic reason why *in camera* inspection is not necessary in the circumstances of this case and accordingly should not be ordered. As recognized in *New England Medical Center*, and by every other appellate court that has considered the issue, for the period of time during which an investigation or law enforcement proceeding is active, the entire contents of the investigatory file are "temporarily" exempt pursuant to Exemption 7(A). When enforcement proceedings are concluded, or when such proceedings are no longer a prospect, this

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13/ (continued)

for any other records. H.R. Rep. No. 93-1380 (Conference Report on the 1974 Amendments), 93d Cong., 2d Sess., at 7. But, the Congress also indicated that "such *in camera* inspection need not be automatic," and that "[b]efore the court orders *in camera* inspection, the Government should be given the opportunity to establish by means of testimony and detailed affidavits that the documents are clearly exempt from disclosure." *Id.*

The court in *New England Medical Center Hospital*, *supra*, 548 F.2d at 385 n.9, took note of the recent legislative change and concluded: "We think that the flexible approach of *EPA* v. *Mink*, *supra*, still applies."

14/ As noted *supra*, in *Safeway Stores, Inc.* v. *Federal Trade Commission*, *supra*, 428 F. Supp. 346, the court held that a 170-page report of investigation was exempt without examining the record *in camera*.

exemption no longer applies. So long as it does apply, however, there is no purpose to be served by an *in camera* inspection. The only relevant considerations are: (1) whether there is an active investigatory or law enforcement proceeding; and (2) whether the records in issue are relevant to that proceeding. If that much is proved to the court's satisfaction, no closer "judicial oversight" is required.

Here, the existence of an active investigation and the nature of the records involved is not in doubt. The plaintiffs' complaint and the other papers they have filed show that they seek a report of investigation—an investigation which, it cannot be disputed, is still active and a report, relating to that investigation, which is itself still in progress. The nature of the "interference" that will result is similarly shown by the affidavits filed by the Commission and by the "surrounding circumstances." These are the only relevant facts. *Inspection of the records in question will add nothing to the Court's knowledge of these facts*. Nevertheless, an order requiring production would in itself necessarily result in considerable disruption to the ongoing work of the New York Regional Office. Plaintiffs would doubtless benefit from the additional publicity they could generate if this Court were to issue an order directing the Commission to produce its unfinished report; but there is, quite simply, no legitimate purpose that would be served by such an order, and a risk of considerable damage to the public interest. The Commission, therefore, respectfully submits that the Court should not order production of the draft portions of the report for *in camera* inspection.

III. THIS ACTION IS FRIVOLOUS AND WAS INSTITUTED AND LITIGATED IN BAD FAITH, AS EVIDENCED BY THE CONTINUING EFFORTS OF THE PLAINTIFFS TO USE THIS ACTION TO GENERATE PUBLICITY FOR MR. HARNETT'S MAYORAL CAMPAIGN; ACCORDINGLY, THE COURT SHOULD AWARD THE COMMISSION ITS COSTS IN DEFENDING THE ACTION, INCLUDING REASONABLE ATTORNEY'S FEES.

The plaintiffs' continuing use of this action to generate publicity for Mr. Harnett's mayoral primary campaign serves to underscore the Commission's contention, first raised in its memorandum in support of its motion to dismiss and reiterated, in a supplemental memorandum, in light of the plaintiffs' extraordinary motion to show cause and the unfounded speculations in Mr. Harnett's sworn affidavit filed therewith, that this action has been instituted and prosecuted by the plaintiffs in bad faith.

The press release issued by the plaintiffs on July 22, 1977, and transmitted by Mr. Marshall to the Court at its request, by letter dated July 26, 1977, is a further example of the efforts of the plaintiffs to use both the Commission and this Court as a springboard for Mr. Harnett's campaign. The protestation of Mr. Marshall that the plaintiffs' latest public offering was issued "without [his] knowledge, consent nor approval" is unavailing. Mr. Marshall is not merely counsel to the plaintiffs in this action, but a plaintiff himself; he cannot disassociate himself from the actions of his co-plaintiffs. Indeed, the plaintiffs to this action are all participants in the same calculated plan designed to ballyhoo Mr. Harnett's campaign.

The plaintiffs' bad faith in this regard continues. The Commission has been advised that Mr. Harnett, in an interview broadcast by the CBS radio network on Wednesday, July 27, 1977, the day after the show-cause hearing, again raised the red herring of "cover-up" and the innuendo that the Commission's staff's efforts diligently to complete a thorough and accurate report to the Commission on an extremely complex matter were, instead, politically motivated machinations to suppress the facts uncovered so far in the investigation. In light of Mr. Marshall's representations to the Court that the plaintiffs attributed no such motivations to the Commission, the public remarks of his co-plaintff made the following day only serve to re-emphasize the Commission's contention that this action was instituted and has been prosecuted in bad faith.

Accordingly, the Commission is again constrained to submit that it is entitled to the award of the costs it has expended in the defense of this meritless action, including an allowance for reasonable attorney's fees.

CONCLUSION

For the reasons stated in our motion to dismiss and memorandum in support thereof, filed with the Court on July 22, 1977, the complaint should be dismissed, since the plaintiffs have failed to pursue the prescribed administrative remedy.

Alternatively, the Court should dismiss this action since all the records sought by the plaintiffs are exempt from production under the FOIA since they are intra-agency memoranda and investigatory records the disclosure of which would interfere with enforcement proceedings. *In camera* inspection of the records should not be ordered.

The Court should award the Commission its costs in defending this litigation, including reasonable attorney's fees.

Respectfully submitted,

HARVEY L. PITT
General Counsel

PAUL GONSON
Associate General Counsel

JAMES H. SCHROPP
Special Counsel

JOHN P. SWEENEY
Attorney

Securities and Exchange Commission
Washington, D.C. 20549
(202) 376-8003 (Sweeney)

WILLIAM D. MORAN
Regional Administrator
New York Regional Office
Securities and Exchange
Commission
26 Federal Plaza
New York, New York 10007
(212) 264-1636

Dated: July 28, 1977

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs,

v.

77 Civ. 3110 (VLB)

SECURITIES AND EXCHANGE COMMISSION and
EXECUTIVE OFFICE OF THE PRESIDENT OF
THE UNITED STATES,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

WILLIAM D. MORAN, being duly sworn, deposes and says:

1. I am the Regional Administrator of the New York Regional Office of the Securities and Exchange Commission. I make this affidavit on personal knowledge in support of the Commission's Supplemental Response to the Order to Show Cause Entered by this Court on July 22, 1977.

2. The Commission's investigation in the matter of the City of New York was instituted in January, 1976, pursuant to the formal Order of Investigation received by the Court on July 26, 1977, for *in camera* inspection. That order specifies:

(a) the provisions of the federal securities laws pursuant to which the investigation is being conducted;

(b) the provisions of the federal securities laws which, it appeared to the staff of the Commission in January, 1976, may have been violated;

(c) the facts known to the staff of the Commission in January, 1976, which tended to show that violations of the federal securities laws might have occurred.

3. Following the entry of the formal Order of Investigation in January, 1976, by the Commission, a comprehensive inquiry was undertaken

by members of the staff of the Commission's New York Regional Office, acting under my direct supervision and guidance. Even at the present time, certain aspects of this information gathering process are continuing.

4. At the present time, however, the primary work of the New York Regional Office with respect to the investigation in the matter of the City of New York consists of organizing, indexing and analyzing the information received in the course of the investigation and, as indicated in my affidavit dated and filed with the Court in this action on July 22, 1977, the New York Regional Office is currently in the process of writing a comprehensive Report of Investigation.

5. Various portions of the New York Office's report of investigation are now in various stages of drafting or completion. As portions of the report are drafted, they are, in the normal course, edited, checked against the raw investigative records to verify the statements made in the draft report, and re-edited as necessary. Eventually, and as expeditiously as possible, a complete Report will be assembled and I will review it. The report will then be transmitted to the Commission's Director of Enforcement and the Commission's General Counsel in Washington, D.C. for their consideration and review. After their review, a staff report will be submitted to the Commission for its consideration. At that time, the Commission will consider what, if any, law enforcement action should be taken.

6. The files and documentary materials relating to this law enforcement action that have been gathered by my staff are presently needed by my staff to complete their efforts and to verify statements they are drafting. If these documents were required to be reproduced and transmitted to this Court, or the plaintiffs, much of the ongoing work of my staff would be required to stop.

7. Any public disclosure of the portions of my staff's Report that now exist in draft form would be extremely disruptive to the work of this Office in compiling and completing its Report on an expeditious schedule, and would complicate and necessarily interfere with the ongoing efforts of the New York Regional Office to complete its work in a timely manner. Premature public disclosure could affect the quality, and perhaps even the accuracy, of the final report by creating pressure to finish the report on an overly hurried schedule. Premature disclosure could also prejudice the Commission's ability to prosecute successfully any law enforcement proceeding that may result from the investigation in question; at a minimum, such premature disclosure could complicate and prolong any such proceedings by unnecessarily injecting issues relating to the possible infringement of the rights of those ultimately named in such proceedings. Finally, premature public release, particularly at this critical time, could interfere with, and seriously detract from, the ability of the Commission to consider the report of the New York Regional Office in a rational atmosphere conducive to arriving at a careful and reasoned decision.

William D Moran

WILLIAM D. MORAN
Regional Administrator
New York Regional Office
Securities and Exchange Commission
26 Federal Plaza
New York, New York 10007
(212) 264-1636

Subscribed to and sworn before me
this 28th day of July, 1977

Henry Wong
NOTARY PUBLIC

HENRY WONG
Notary Public, State of New York
No. 31-4238135
Qualified in New York County
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, et al.,
Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,
Defendants.

77 Civ. 3110

CERTIFICATE OF SERVICE

I, JOHN P. SWEENEY, hereby certify that:

1. I am over 21 years of age and employed by the United States Securities and Exchange Commission as an attorney in the Office of the General Counsel.

2. On the 28th day of July, 1977, I caused to be served a copy of the defendant Securities and Exchange Commission's Supplemental Response To The Order To Show Cause Entered By The Court On June 22, 1977, And In Support Of Its Motion To Dismiss and the second affidavit of William D. Moran by personal service upon:

Gordon Marshall, Esquire
60 East 42nd Street
New York, New York 10017
Attorney for Plaintiffs

JOHN P. SWEENEY
Attorney

Securities and Exchange Commission
Washington, D.C. 20549
Telephone (202) 376-8003

Dated: July 28, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

JOEL HARNETT, et al,

Plaintiffs,

77 Civ 3110 VLB

-against,

SECURITIES AND EXCHANGE COMMISSION,
et ano,

Defendants.

- X

MEMORANDUM OF LAW ON BEHALF OF PLAINTIFFS IN SUPPORT OF THE ORDER TO SHOW CAUSE

GORDON MARSHALL
60 East 42nd Street
NEW YORK, N. Y. 10017

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

77 Civ 3110 VLB

Plaintiffs,

-against-

SECURITIES AND EXCHANGE COMMISSION
and EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

Defendants.

- X

MEMORANDUM OF LAW ON BEHALF OF PLAINTIFFS IN SUPPORT OF THE ORDER TO SHOW CAUSE

PRELIMINARY STATEMENT

This is an action brought on behalf of the plaintiffs which seeks an order of this Court directing the release of the Report of the SECURITIES AND EXCHANGE COMMISSION (hereinafter referred to as "SEC") concerning the investigation by the SEC into and relating to the sale of municipal bonds and securities of the City of New York.

The order to show cause further requests the defendants to show cause why an order should not be made pursuant to Title 5 USCA, Section 552 ordering that the Report of the SEC (including but not limited to the Report of the New York Regional Office of the SEC) be produced and delivered to the Court for examination by the Court in camera to enable the Court to determine whether such Report or any part thereof should be withheld under any of the exemptions set forth in subsection (b) of Section 552 relating to exemptions and to order the immediate release of all of the SEC Report which is not exempt.

STATEMENT OF THE FACTS

So as not to unduly burden this Court, the facts have been set forth in the complaint and in the moving affidavits.

The only affidavit submitted by either of the defendants is a four paragraph affidavit of WILLIAM D. MORAN, Regional Administrator of the New York Regional Office of the SEC stating that the New York Regional Office allegedly has "not completed its investigation in the matter of the City of New York, and no complete report has been written or sent to the Commission in Washington, D.C. "

Mr. MORAN does not offer any interpretation of the word "completed" nor the word "complete".

Mr. MORAN does not deny in his affidavit that a Report was delivered by the New York Regional Office to the SEC Chairman WILLIAMS on or about July 15,1977.

Mr. MORAN does not deny in paragraph "4" of his affidavit that it would be disruptive of the work of the SEC if the draft of the Report were to be delivered to the Court, but he is silent as to the fact that delivery of copies of the draft of the Report would not be disruptive at all.

It is essential to state under this Statement of Facts that other than the very brief and limited affidavit of Mr. MORAN, there is not a scintialla of probative evidence (either documents or affidavits) which sustains the government's burden of applying any claimed exemption to any specific language contained in the Report.

There is no basis submitted under oath on behalf of the government upon which this Court could rule in the government's favor.

The broad and sweeping conclusions contained in the memoranda submitted on behalf of the SEC have no probative value whatsoever and are insufficient and inadequate for this Court to be able to rule in favor of the government.

The SEC admittedly did not respond to the demand for a copy of the Report within the time required by the Freedom of Information Act (hereinafter referred to as FOIA" and did not advise the writer of the demand of his right to appeal the refusal of the request and the response was not made within the time proscribed by the FOIA.

The SEC in its memorandum admitted and conceded that "The Commission does not insist on formalistic compliance with its rules relating to requests made pursuant to the FOIA." The SEC does require that the request be understood to be seeking access to some specific record or records.

The demand of Mr. MARSHALL set forth in detail in paragraph "TWENTY-SEVENTH" of the complaint could not more accurately and completely describe the records sought.

Indeed, the response by Mr. PITT to Mr. MARSHALL's letter, which response is set forth in its entirety in paragraph "TWENTY-EIGHTH" of the complaint, does not question the identity of the records sought by Mr. MARSHALL.

The Chairman of the SEC has been reported in the press to have made a commitment to Senator Proxmire and the United States Senate Banking Committee to release the SEC Report on its investigation of the sale of New York City bonds and securities prior to the end of the summer. The United States Senate Banking Committee has made arrangements to fly to New York a copy of the letter containing Chairman WILLIAMS' commitment, which commitment is dated May 4,1977 and it is hoped that a copy of said letter can be submitted to this Court within the 48 hours allocated to counsel for the plaintiffs for additional memoranda.

This Court should enforce the SEC's commitment made as long ago as May 4, 1977. The record does not contain any facts indicating any disability on the part of the SEC occurring after May 4, 1977 which would diminish the ability of the SEC to fulfill the commitment of its Chairman made to the Chairman of the United States Senate Banking Committee.

There will be a Primary Election in the City of New York with respect to making nominations for the highest offices in the City government including the office of Mayor and Comptroller.

It has been speculated in the press that the facts disclosed in the SEC Report will relate to various office seekers and to backers of such office seekers and other office seekers who may not have held office at the time of the sale of municipal bonds, which is the subject of the investigation.

The public has a right to know the involvement and extent, if any, of the involvement of all those who are seeking to be entrusted with the government for the next four years and their backers.

Congress has enacted the FOIA to prevent the SEC from withholding the facts from the public gleaned by the SEC over the last 19 or more months in the publicly financed investigation.

All of the major newspapers in the City of New York have taken an editorial position in support of the release of the SEC Report at this time or the release of whatever parts of the SEC Report may be ready at this time and the New York Times has recommended to this Court that if the SEC claims the Report is not completed, that this Court exercise its power under the FOIA and direct that the Report be completed and released immediately in sufficient time for the public to debate the facts disclosed by the Report prior to the public having to exercise its voting franchise in the Primary Election on September 8, 1977.

POINT I

THE PURPOSE OF THE FREEDOM OF INFORMATION ACT IS TO ENCOURAGE DISCLOSURE OF GOVERNMENT DOCUMENTS AND INFORMATION

Title 5, United States Code Annotated, Section 552 (b) provides in part:

> "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."

Subsection (c) of Section 552 further provides as follows:

> "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section."

Accordingly, the public policy as expressed by the Congress courts of the United States is in favor of the disclosure rather than the withholding of non-exempt records and information.

Indeed, it has been held that the balance of the equities in determining whether the court should order disclosure under Section 552 is presumptively on the side of disclosure.

> Consumers Union of U.S., Inc.
> v. Veterans Administration,
> D.C.N.Y. 1969, 301 F.Supp. 796,
> appeal dismissed 436 F.2d 1363

POINT II

THE BURDEN IS SQUARELY UPON THE GOVERNMENT TO PROVE THAT AN EXEMPTION SHOULD BE APPLIED TO ANY PAGE, DOCUMENT OR EVEN SENTENCE SOUGHT TO BE WITHHELD BY THE GOVERNMENT

The government has failed to sustain its burden in having an exemption applied to any page, sentence or word contained in its Report as to its investigation into the affairs of the City of New York by virtue of the fact that there is not a scintilla of proof by affidavit or oral testimonth or otherwise linking the claimed exemption to a single phrase, sentence or paragraph or page or document of the SEC Report.

It is the obligation of the SEC to specifically state what segregable portion of its documents can be released.

Montrose Chemical v. Train
491 F.2d 63 (D.C.Cir. 1974)

Washington Res. Project, Inc.
v. H.E.W., 504 F.2d 238 (D.C.Cir. 1974)

It has been held that the government must furnish a list of the documents being withheld.

Vaughn v. Rosen, 484 F.2d 820
(D.C.Cir. 1973)

It has also been held that if the government withholds any information they must reveal factual reasons as to each and every document withheld.

Pacific Architects and Engineers, Inc.
v. Renegotiation Board, 505 F.2d 383
(D.C.Cir. 1974)

I.T.T. Continental Baking Co. v. F.T.C.
5 C.C.H. Trade Reg. Reporter, ¶60,795
(D.D.C. 1976)

The response of the SEC on this motion can only be termed arrogant in that no attempt has been made to meet its burden to identify the documents, nor to identify the material which should be withheld and which should be released nor to reveal any facts with respect to any of the substance and subject matter ~~substances~~ upon its investig which this Court can make an intelligent determination.

Indeed, the lack of candor with which the SEC has responded to this motion is marked by the similarity of the intention of the SEC to keep this Court in as much of the dark as the people of the City of New York.

It is obvious from the oral argument and from the briefs submitted on behalf of the SEC that the SEC has no intention whatsoever to furnish this Court with any of the documentation and proof which Congress has required it furnish nor for this Court to execute its function granted to it by Congress to act in camera and to cause the immediate release of all of the information which in the opinion of this Court is not exempt.

Section 552 (b)(5) provides an exemption for inter-agency or intra-agency memos or letters which would not be available by law to a party. This exemption is therefore not a blanket exemption. The exemption relates only to those items which would not be available by law. Gathering of facts is available by law. A memorandum from someone in the SEC to someone else in the SEC relating to how they will arrive at a decision as to what policy decision to take as a result of the facts would be exempt.

Very little of the SEC investigation consists of such exempt material.

All of the documents relating to the SEC must be turned over to this Court for this Court to determine what should or should not be released.

Similarly Section 552(b)(7) provides for the so-called investigatory exemption. However, this exemption is not a blanket exemption, but applies to a very, very limited area since it has many qualifications.

The subdivision (7) exemption exempts investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings; (B) deprive a person of a right to a fair trial or an impartial adjudiciation; (C) constitute an unwarranted invasion of personal privacy; (D) disclose the identity of a confidential source, etc. in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation and that only with respect to confidential information furnished only by the confidential source; (E) disclose investigative techniques and procedures or (F) endanger the life or physical safety of law enforcement personnel.

There is no judicial or statutory authority for the SEC to come into this Court and waive the flag of exemption (7) and apply it to the antire result of their investigation over the last 19 months.

First of all, nowhere in the papers submitted to this Court do they claim that the investigation is for law enforcement purposes. Such claim was made for the first time orally during the argument by Mr. PITT.

However, even if one of the purposes of the investigation was for law enforcement purposes, an exemption would apply only to the extent as specifically authorized by the subdivision of exemption (7) and only if the SEC were able to prove in each instance to the satisfaction of this Court that the exemption should apply (to specific words or sentences] and then only in the most narrow and restricted sense should this Court authorize the withholding of such limited material.

It must also be questioned as to why the Chairman of the SEC would represent to the Chairman of the United States Senate Committee on Banking that the Report would be released before the end of the summer and the same SEC should take a position in this Court ranging from "there is no report and therefore there was no report to bring to court" or "the report consists of thousands of sheets of paper" or "exemptions (5) and (7) apply to the entire report", without offering any proof with respect to a single word contained in the Report and without identifying, as required to by law, a list of each and every document to which they claim the exemption applies.

Factual matters are not exempt from discovery under Section 552 as intra-agency memoranda.

Washington Research Project, Inc.
v. Department of Health, Ed. and Welfare
(1974), 504 F.2d 238, 164 U.S.App. D.C. 169
certiorari denied 95 S.Ct. 1951, 421 U.S.963,
44 L.Ed. 2d 450

Subsection (b)(5) protects deliberative or policy making process, but does not exempt factual or scientific information.

U.S. v. J.B. Williams Co. Inc.
(D.C.N.Y.1975) 402 F.Supp. 796

In Koch v. Department of Justice (D.C.D.C. 1974) 376 F.Supp. 313, the Court held that to be exempt under the intra-agency memorandum, the Court must inquire into the nature of the materials by means of affidavits or in camera review as to an assertion that the materials do in fact contain an expression of views in formulation of agency policies and decisions and to determine whether such expressions are joined with factual information which can and should be disentwined from policy making process.

Tax Analysists and Advocates
v. Internal Revenue Service (D.C.D.C. 1973)
362 F.Supp. 1298, modified in part on other
grounds and remanded 505 F.2d 350,
164 U.S.App. D.C. 243

Furthermore, agency reports which contained opinions and conclusions, but which were not prepared in anticipation of litigation were not protected from discovery.

U. S. v. Illinois Fair Plan Ass'n
(D.C. Ill. 1975) 67 F.R.D. 659

Work notes and written data in the absence of government proof to the contrary have to be considered purely objective and factual in nature and were outside of the exemption scope even though they included comments.

Verrazzano Trading Corp. v. U.S. (1972)
349 F.Supp. 1401, 69 Cust. Ct. 307,
C.R.D. 72-19

The SEC is attempting to misapply the scope of the intra-agency memoranda exemption. All of the fruits of the Agency's 19 month investigation are not exempt and should be released. Any written communications among the employees or Commissioners of the SEC as to how they want to treat the material and what action the SEC should take if any with respect to such material could be exempt if proven to be by the SEC since Congress had the attorney work product privilege specifically in mind when it adopted the exemption relating to intra-agency memoranda.

> N.L.R.B. v. Sears, Roebuck & Co.
> (Dist. Col. 1975) 95 S. Ct. 1504,
> 421 U.S. 132, 44 L.Ed. 2d 29

There is a vast difference between the fruits of the investigation and the predecisional communications with respect to what the SEC intends to do with those facts.

The exemption from disclosure of inter or intra-agency memoranda would not be available and was not intended to protect purely factual facts and statements which are in no way deliberative or advisory.

> Marathon Le Tourneau Co., Marine Division
> v. N.L.R.B. (D.C. Miss. 1976) 414 F.Supp. 1074

Accordingly, the position of the SEC in attempting to apply the exemption provisions of the FOIA are completely inappropriate and are not supported by any proof whatsoever.

POINT III

THE GOVERNMENT HAS NOT MET ITS BURDEN

The government has the burden of proving that documents sought under this section are within the protection of statutory exemptions for disclosure.

Campbell v. U. S. Civil Service Commission
(C.A.Colo. 1976) 539 F.2d 58

The *Campbell* case, *supra*, further held that the district court has broad discretion in determining whether the government has sustained its burden of establishing the applicability of an exemption from disclosure under this section.

Even if materials of a federal agency include final opinions made in the adjudication of cases and instructions to a staff, the agency has an additional duty under Section 552; it must not only release the documents to the public but must also maintain and make available current indexes listing those materials and the agency can escape this responsibility only if it sustains the burden of showing that the documents fall within one or more of the exemptions.

Kent Corp. v. N.L.R.B. (C.A. Ala. 1976)
530 F.2d 612

Indeed, in a later replay of the Vaughn v. Rosen case, the Court held that affidavits, on cross motions for summary judgment, failed to carry government's burden of proof of exemption where the affidavits were not only conclusory but failed in any way to define, explain, or limit the deliberative process which the government sought to protect.

Vaughn v. Rosen (1975), 523 F.2d 1136
173 U.S. App. D.C. 187

In the case at bar the government did not even submit any affidavit in an attempt to sustain its burden and has not referred to a single word among the thousands of pages it claims it has with respect to its investigation.

It has further been held that the exemption under Section 552 which protects investigatory records compiled for law enforcement purposes is only applicable where there exists concrete prospective law enforcement proceedings and places a burden on the agency claiming such exemption to prove to the court by appropriate means, which may include in camera inspection, that the government's claim is well founded.

Marathan LeTourneau Co., Marine Division
v. N.L.R.B. (D.C. Miss. 1976) 414 F. Supp. 1074

It has been held in this very court that the Federal Trade Commission failed to carry the burden of showing that certain sought deletions were justified and failed to prove that one of the exemptions was applicable when it failed to present a single affidavit by a member of the Commission or its staff stating the basis for the conclusion of the Commission that certain names and identifying materials should have been deleted from certain documents and where the FTC made no attempt to scrutinize the documents individually.

Mobil Oil Corp. v. F.T.C. (D.C.N.Y. 1976)
406 F. Supp. 305

The burden is upon the government to establish that the materials sought by the plaintiffs fall within very narrowly construed exemptions in FOIA.

Philadelphia Newspapers, Inc. v. U.S. Dept. of Justice (D.C. Pa. 1975) 405 F.Supp. 8

This Court also decided that it is the court's function to determine the matter de novo and the agency has the burden to justify its decision not to disclose the requested information.

Kreindler v. Department of Navy of U.S. (D.C.N.Y. 1973) 363 F.Supp. 611

It is not necessary for the person requesting disclosure to show need or purpose for the disclosure.

Morton Norwich Products, Inc.
v. Mathews (D.C.D.C. 1976)
415 F. Supp. 78

Accordingly, the reasons ascribed by the SEC to the plaintiffs as either political or publicity is completely irrelevant and such reasons are vehemently denied.

POINT IV

THE COURT HAS THE PRIVILEGE AND RIGHT AND OBLIGATION TO CONDUCT IN CAMERA INSPECTION TO MAKE ITS DETERMINATION

Although the government cited in support of its argument against in camera inspection Environmental Protection Agency v. Mink (Dist. Col. 1973) 93 S. Ct. 827, 410 U.S. 73, 35 L. Ed. 2d 119, such case related to documents relating to atomic bomb explosion, which specifically came into exemption as being substantially covered by Executive Order keeping such documents secret in the interest of the national defense. Such case is inapplicable to the case at bar and is easily distinguished.

Where in an action under Section 552 the government in its submission of its motion for in camera proceedings made only one conclusory representation, in brief form, and there was merely an attempt by in camera lawyers' papers classified as top secret to cut off request for information at the outset, it was held that the government's submission was "woefully inadequate."

Military Audit Project v. Bush
(D.C.D.C. 1976), 418 F.Supp. 876,
supplemented 418 F.Supp. 880

The Military Audit Project case, supra, felt that ex parte in camera proceedings were unnecessary because the government in most if not all contested cases should be able to satisfy its exemption claim in open court with sufficient specificity. The in camera inspection of the Report was ordered in Rabbitt v. Department of the Air Force (D.C.N.Y. 1974) 383 F.Supp. 1065, reconsideration granted 401 F. Supp. 1206.

In Vaughn v. Rosen, (D.C.D.C. 1974) 383 F. Supp. 1049, affirmed 523 F.2d 1136, 173 U.S.App.D.C. 187, it was held that where the administrative agency asks exemptions as to items sought under Section 552 the appropriate procedure is for the court to review the documents in camera and to evaluate the claim of exemption asserted.

Other cases (B & C Tire Co., Inc. v. Internal Revenue Service, Dept. of Treasury, U.S. (D.C. Ala 1974) 376 F.Supp. 708) held that detailed affidavits and oral testimony may suffice in open court, but nowhere does any case support the arrogance of the SEC in appropriating to itself the function of this Court under the FOIA.

It must also be noted that it has been held that the 1974 amendments to Section 552 dealing with in camera inspection of documents were designed to increase the power of federal courts to engage in full in camera review of agency decisions.

Bell v. U.S. Dept. of Defense (D.C.N.H. 1976)
71 F.R.D. 349

CONCLUSION

The order to show cause of the plaintiffs should be granted in its entirety and this Court should make special provision for the expeditious delivery to this Court of any documents which this Court is required to exempt in camera in order to sustain any specific exemption which in the opinion of this Court is appropriate and in order to effecutate a release to the plaintiffs of all of the demanded material well in advance of September 8, 1977.

Dated, New York, New York
July 28, 1977

Respectfully Submitted

GORDON MARSHALL
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs, 77 Civ 3110 VJB

-against-

SECURITIES AND EXCHANGE COMMISSION
and EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

Defendants.

- x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

GORDON MARSHALL, being duly sworn, deposes and says:

1. During oral argument in this Court on July 26,1977, I made a statement on such oral argument concerning a portion of the contents of a telephone conversation with HARVEY PITT, General Counsel of the SECURITIES & EXCHANGE COMMISSION (hereinafter referred to as "SEC").

2. I stated to this Court that I would repeat such statement in an affidavit, which I hereby do.

3. On May 2,1977 I had a telphone conversation with HARVEY PITT in connection with a letter I had sent to Chairman HAROLD WILLIAMS of the SEC.

4. During my conversation with Mr. PITT on May 2,1977, Mr. PITT asked me whether or not I intended to bring an action under the Freedom of Information Act (hereinafter referred to as "FOIA") to compel the SEC to release the Report of the SEC concerning the results of its investigation as to the financing of the City of New York and the sale of municipal securities to the public and whether such sales constituted a fraud on the public and/or a deception of the public.

5. I replied to Mr. PITT that it was premature to determine at that moment whether or not I would bring an action under the FOIA. I stated to him that I was not in the habit of bringing needless litigation nor litigation which my client had no chanc of winning. Mr. PITT replied that he was glad to hear that. I stated to Mr. PITT that I would have to first see the reply of Chairman WILLIAMS before I could make a determination as to whether or not I should bring an action under the FOIA.

6. Mr. PITT requested of me that if I decided to bring an action under the FOIA that I give him the courtesy of telephoning him and advising him before I was about to serve any papers in such lawsuit and I promised Mr. PITT that I would do so.

7. Indeed, a few days before this suit was actually started, in conformity with Mr. PITT's request and my promise, I did actually telephone his office and left word with his secretary that I was about to start this FOIA action.

8. Since oral argument took place in the Court on July 26,1977, I have been further reminded as to another aspect of my conversation with Mr. PITT on May 2,1977 with respect to our discussion concerning a possible action under the FOIA. I asked Mr. PITT whether or not it would be necessary to name and serve all of the individual Commissioners and the Chairman of the SEC and Mr. PITT responded that in many occasions the Commission prefers each of the Commissioners and Chairman to be named. However, Mr. PITT added that in FOIA actions it is sufficient to merely name as a defendant the SEC.

9. In preparing the suit papers for this action I relied

upon the above portions of my conversation with Mr. PITT.

10. I must further note in this connection that during oral argument on July 26,1977 Mr. PITT's response was that he did not invite any FOIA action to be instituted against the SEC.

11. I never claimed nor suggested that Mr. PITT invited this action. Mr. PITT merely requested that I give him advance notice in the event I decided to bring this action.

12. I mentioned the conversation with MR. PITT during oral argument to demonstrate that on May 2,1977 and before any reply was prepared at the SEC to my letter to Chairman WILLIAMS, Mr. PITT, general counsel of the SEC, was well aware that my request for the SEC Report was made pursuant to the FOIA and that Mr. PITT well knew at that time that any refusal on the part of the SEC to furnish the Report could well indeed result in the commencement of the lawsuit which now exists.

Sworn to before me this
28th day of July, 1977

Fay D Steinberg

GORDON MARSHALL

FAY D. STEINBERG
Notary Public, State of New York
No. 31-3828193
Qualified in New York County
Commission Expires March 30, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs, 77 Civ 3110 VLB

-against-

SECURITIES AND EXCHANGE COMMISSION
and EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

Defendants.

- X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

GORDON MARSHALL, being duly sworn, deposes and says:

1. I am the attorney for the plaintiffs and am one of the plaintiffs.

2. I make this affidavit:

(a) in opposition to the motion of the SECURITIES AND EXCHANGE COMMISSION (hereinafter referred to as "SEC") to dismiss the complaint, and

(b) in opposition to the cross-motion of the SEC to strike the provision of the order to show cause requiring the SEC to bring the complete SEC Report to Court, and

(c) in support of the relief requested by the plaintiffs in the order to show cause of the plaintiffs presently pending.

3. I am submitting a separate affidavit, as I promised to do during argument in open Court, with respect to the telephone conversation I had with Mr. PITT on May 2,1977.

WITH RESPECT TO THE SEC'S MOTION TO DISMISS THE COMPLAINT

4. I believe that the motion to dismiss made by the SEC was merely a pro forma motion and is totally devoid of merit. The SEC stated in its memorandum that "The Commission does not insist on formalistic compliance with its rules relating to requests made pursuant to the FOIA; so long as a person can be understood to be seeking access to some specific record or records, rather than making a generalized inquiry such as was made by Mr. Marshall, the request will not be rejected merely because it fails to invoke the FOIA, or was directed to the wrong office of the Commission."

5. In view of the fact that the Commission does not insist upon adherence to its rules with respect to labeling the request as a request under the FOIA, or labeling the envelope or addressing the request to one person rather than to the Chairman of the Commission, the Commission cannot seriously urge this Court to treat my request as invalid, inappropriate or in non-compliance.

6. It was clear during oral argument that the request was unmistakably a request for the Report of the SEC under the FOIA and that the general colloquial description of the Sunshine Laws (referred to the right of the public to access to government records and hearings) was utilized.

7. Mr. PITT seeks to rely on his interpretation that "a cognizable request for specified records must be presented ...".

8. As appears in paragraph "TWENTY-SEVENTH" of the complaint, a description of the records demanded is as follows:

> "I would appreciate your furnishing to me by return mail a copy of the SEC Report on the results of its investigation of the sale of New York City bonds and securities and whether or not such sale and the practice involved in the disclosure of city financial information is deemed to have been a deception of the public."

9. With all that has been written over the last 19 months about the SEC investigation and Report, I modestly must state that nowhere has the Report been described as well or as succinctly as in my demand upon Chairman WILLIAMS.

10. The fact that my demand to Chairman WILLIAMS was assigned to the General Counsel, Mr. PITT, for personal preparation of a reply by Mr. PITT demonstrates that neither the importance of my letter nor the subject matter of my letter was lost upon Chairman WILLIAMS, Mr. PITT and their staff.

11. I telephoned Chairman WILLIAMS' office on four separate days to press for a reply to my letter of April 18,1977 before I spoke with Mr. PITT on May 2,1977.

12. Accordingly, I must urge that this Court consider the motion of the SEC to be a red-herring and that we get on with the main issues which need to be resolved by this Court with re-

spect to the identification and review of the SEC Report and the release of all non-exempt portions to the public.

WITH RESPECT TO THE SEC'S CROSS-MOTION TO STRIKE THAT PORTION OF THE ORDER TO SHOW CAUSE REQUIRING THE SEC TO BRING THE COMPLETE SEC REPORT TO COURT

13. I presume that this branch of the SEC's motion was rendered moot when this Court temporarily stated that in view of Mr. PITT's statement that there was no completed Report that no contempt would lie for failure to bring the complete Report to Court. Such statement from the Bench during oral argument would necessarily render moot whether or not the Court should, or indeed it was necessary, to strike that portion of the order to show cause.

14. However, there still remains the basic order to show cause requesting that this Court immediately order the release of the SEC Report after reviewing all of the SEC's documents in camera to determine what aspects of the Report are not exempt.

WITH RESPECT TO AND IN SUPPORT OF THE ORDER TO SHOW CAUSE ON BEHALF OF THE PLAINTIFFS

15. I must state for the record that I do not believe that the naked assertion by the SEC that the Report is incomplete can be taken at face value or can be relied upon.

16. When Mr. PITT stated that no one in the SEC had ever been charged with politicizing the SEC his memory failed to go back to the former chairman, Mr. Casey and the charges made against Mr. Casey and his subsequent resignation as a result of Mr. Casey's defense of former Attorney General Mitchell.

17. In any event, considerable information has reached my office that the investigation by the SEC has been completed and that all of the results of its investigation into the financial affairs of the City of New York are in hand, collated and analyzed and have been written up in as final a form as ever will be necessary unless one desires to polish the writing in a literary manner, which polishing can go on for years and years and years.

18. I have been informed personally by MARTIN TOLCHIN that the Chairman of the SEC personally advised Mr. TOLCHIN in a public interview that Mr. MORAN, New York Regional Administrator had delivered the completed Report from the New York region to Mr. WILLIAMS on July 15,1977.

19. On May 5,1977, WILLIAM MORAN, New York Regional Administrator of the SEC, stated to deponent and to three other persons present that the New York investigation had been essential completed, but that its submission to Washington was delayed because of the resignation of Mr. THOMAS HYLAND, who was the attorne in charge of the investigation, and the subsequent resignation of Mr. HYLAND's replacement, Mr. ED BOYLE.

20. The only statement under oath submitted in opposition to the entire application by the SEC is a brief and curt 1-1/2 page affidavit by Mr. MORAN that "no complete report has been written or sent to the Commission in Washington, D.C." (emphasis added)

21. The word "complete" can be a very subjective descriptive term. A document can be deemed to be incomplete because

of a missing sentence or a missing conclusion, but such incompleteness would not be the incompleteness required to defeat a disclosure under the FOIA. Indeed, incompleteness is not a defense.

22. It should be noted that virtually all of the defense proffered on the part of the SEC is in the form of memorandum or points. No probative evidence with respect to the allegations or exhibits annexed to the moving papers or to the complaint and its exhibits, which were incorporated by reference, has been offered by the SEC with the exception of Mr. MORAN's very brief affidavit.

23. What did Mr. MORAN deliver to Mr. WILLIAMS in Washington on July 15,1977? What completed Report from the New York Regional office did Mr. WILLIAMS receive and acknowledge receipt of to the New York Times?

24. Why is there not an affidavit by Mr. WILLIAMS denying the actual receipt of the Report from the New York office?

25. Does the SEC characterize the Report as not complete because it does not contain conclusions or recommendations?

26. Has the factual gathering been completed?

27. As stated on oral argument, it is the desire of the plaintiffs that the facts gathered by the SEC be released to the public.

28. Should not the people of the City of New York, in exercising their right to vote and in selecting those office seekers to be nominees of the major parties, be armed with the knowledge as to the culpability or non-culpability of any of the candidates and any of their backers (financial or otherwise) or is this Court going to condemn the voters of the City of New York to vote in ignorance?

29. There is not a single thread or scintilla of probative evidence submitted on behalf of the SEC to rebut the allegations under oath made in support of the order to show cause nor to sustain the burden of the SEC to prove the applicability of any of the claimed exemptions to any or all of the thousands of pages which Mr. PITT admitted in oral argument exist with respect to the SEC investigation.

30. A separate memorandum of law will be submitted demonstrating that the SEC should turn over to this Court copies of all of the writings in existence at this time so that this Court can examine such writings in camera and make a determination for itself whether or not the Report is complete and whether or not, if the Report is incomplete, such incompleteness relates to matters which would in any event be exempt.

31. It is the position of the plaintiffs that the Report is complete and that this Court should examine whatever it is the SEC has in writing to determine what should or should not be released at this time.

32. I have been careful not to make any charges of scandal or cover up, but I do think that this Court both as a judicial officer and as a private citizen having the same access to the press and other media as do I, must be aware of the importance of the disclosure of the SEC Report to the public and of the capability of the SEC to release such Report and information to the public prior to the Primary Election if the SEC had the desire to do so.

33. I believe that this Court has the obligation under the FOIA to see to it that the Report is released well in advance of September 8,1977 (as suggested in the New York Times editorial of July 26,1977) so as to give the public sufficient time to discuss the issues created by the factual disclosures of the SEC.

34. If the SEC desires to wait until after the Primary Election, and for even ten years beyond such Primary Election, before making up its mind as to its conclusions or recommendations, the public is nevertheless entitled to know now what facts have been unearthed by the SEC as a result of its 19 month long publicly financed investigation.

35. I will submit to this Court either with this affidavit or separately a letter which was written by the Chairman of the SEC (Mr. WILLIAMS) to Senator WILLIAN PROXMIRE of the United States Senate Banking Committee, on or about May 4,1977.

36. I understand that the Senate Banking Committee is flying the letter up to me in time to submit a copy of the letter to this Court within the 48 hour period given to me by the Court during oral argument.

37. The letter was read to me over the telephone and, in anticipation of submitting a copy of the original to this Court, I will state for the record that the letter contained a representation by Chairman WILLIAMS that the Report would be ready and released prior to the end of the summer and hopefully earlier.

38. Many newspaper reporters have telephoned me to advise me that their confidential sources within the SEC have advised them that the Report has been completed and has been written up and could be voted upon for release by the Commissioners.

39. Thus far the reporters cannot reveal their sources, but I assure this Court that the reporters are among the most respected professional men of the national press corps.

40. In view of MR. PITT's statement in open court that the Report is not complete, I must state that in view of my sources Mr. PITT either does not know or does not want to know the present status of the SEC report and its readiness for release.

41. I think that this Court has the power under the FOIA to set down an immediate hearing for Mr. WILLIAMS to come to New

York and testify as to what it was he told Mr. TOLCHIN he had received from the New York Regional office on July 15,1977 and that he bring such documents with him for inspection by this Court.

42. I further request that I be permitted to call as witnesses those people at the SEC who worked upon the Report so that they can testify as to what actually has been completed and that their testimony be used as a countercheck against the broad conclusory statements made in memoranda of law having no probative value as to the status and readiness of the Report for release.

43. Congress has placed upon the shoulders of this Court the responsibility of determining what should and should not be released and whether the information is in a state of being released.

44. This Court cannot (obviously) rely upon the naked conclusions proffered by the SEC in order to determine what should be released to the public at this time.

45. Indeed, not even Mr. PITT would urge that the claimed exemptions under subdivision (5) and (7) of Section 552 applies to every one of the thousands of pieces of papers he admitted existed.

46. The exemptions are very narrow in scope and must be carefully applied only to those specific items on which the government sustains its burden in proving come within the exemption.

47. Case law states that such burden must be made by affidavit or oral testimony under oath and must be concise with respect to each aspect of each item sought to be made exempt.

48. This will become a novel case indeed if an exemption were to be sustained applicable to the entire SEC Report in the absence of any sworn probative evidence with respect to a single word contained in such Report.

49. It is obvious on the record that, in the absence of any portion of the Report submitted to the Judge, in the absence of any affidavit relating any claim of exemption to any writing comprising all or any portion of the SEC report, that the government has not met its burden in proving that any exemption should apply

and that therefore this Court should grant the motion by ordering the immediate release of the entire SEC Report.

50. I cannot emphasize too strongly to this Court, although I know that this Court already knows the importance of the right of the people of the City of New York to know the facts as to how this City was run in the past, as to how funds for the City were raised and as to whether there was any deception of the public with respect to the finances, the budget, the sale of securities of the City and whether if there was any deception it was committed by office holders, banks, brokers, undwriters bond rating agencies or any other person or entity.

51. An election is a referendum by the people to determine in which way and in whose hands the people want their government to continue over the next four years.

52. Someone said once "give the people the facts and they shall be free"..

53. I ask this Court to give the people the facts and not to condemn them to exercise their precious right to vote in ignorance.

54. No other consideration can be of more importance and Congress was so wise in adopting and enacting the FOIA so as to enable this Court to substitute and exercise its judgment in the place and stead of the Chairman of the SEC.

55. The Chairman of the SEC should be directed to adhere to his commitment to Senator PROXMIRE to release the Report no later than the end of the summer. According to The American Heritage Dictionary of the English Language published by Houghton Mifflin Company in 1975 defines "summer" at page 1289 as "in the northern hemisphere ... is popularly considered to comprise June, July and August."

56. I think that the Court is convinced by now that there is nothing frivolous about this action and that the claim of the SEC for attorneys' fees is a red herring and should be treated as such.

57. Annexed hereto, made a part hereof and marked EXHIBIT "G" is a copy of an article published in the New York Post on May 27,1977 with respect to the commitment by SEC Chairman HAROLD WILLIAMS to deliver the completed SEC Report in late

August or early September.

WHEREFORE, I respectfully pray that the order to show cause be granted in its entirety.

Sworn to before me this
28th day of July, 1977

Fay D Steinberg

GORDON MARSHALL

FAY D. STEINBERG
Notary Public, State of New York
No. 31-3823193
Qualified in New York County
Commission Expires March 30, 19 79

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----------------------------------X
JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL.

Plaintiffs, 77 Civ 3110 VJB

-against-

SECURITIES AND EXCHANGE COMMISSION
and EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES.
Defendants.

-----------------------------------X

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

GORDON MARSHALL, being duly sworn, deposes and says:

1: Annexed hereto, and made a part hereof and marked Exhibit "H" is a copy of a letter dated May 4th, 1977 written by HAROLD WILLIAMS, Chairman of the SECURITIES & EXCHANGE COMMISSION (hereinafter referred to as "SEC"), to the Honorable WILLIAM PROXMIRE, Chairman of the United States Senate Committee of Banking, Housing and Urban Affairs.

2: The letter of May 4th, 1977 by Chairman HAROLD WILLIAMS was written as a result of Senator PROXMIRE pressing Mr. WILLIAMS for a date as to when the SEC report will be released. Mr. WILLIAMS stated during the hearing that he did not know but he would find out and advise the Senator by letter.

3: Exhibit "H" was the result.

4: In the letter Chairman WILLIAMS stated that it was the intention of the SEC to conclude its efforts by the end of this Summer and further stated that he would make every effort to complete the work earlier.

5: Attached to the letter of May 4th, 1977 was a copy of the public release of the SEC dated January 8th, 1976 which public release was mentioned by Mr. PITT during oral argument but which he was unable to find in order to hand up to the Court.

6: Attached hereto and made part of Exhibit "I" is a copy of the SEC release dated January 8th, 1976.

7: Nowhere in the SEC release does it indicate or mention that the investigation is for Law enforcement purposes. It does indicate in the last sentence that the purpose is to determine if there should be remedial relief presumably in the form of new legislation.

8: This latter purpose was in addition to the purpose setforth in page #1 to restore confidence in the Municipal bond markets.

9: It should be noted that the SEC release of January 8th, 1976 (Exhibit "I") refers to a formal order of private investigation dated January 5th, 1976 which was issued. Presumably this formal order is the order which was submitted during oral argument to the Court by Mr. PITT "in camera".

10: I cannot comment on the formal order because I have not seen it. It was a condition imposed by the SEC that it would only be furnished to the Court if I did not see it. I consented to this condition having full faith in the integrity of this Court.

11: I make this supplemental affidavit for submission within the forty-eight hours granted for an additional reason; in order to present to the Court additional facts which came to my attention only this morning by a telephone call from Washington, D. C.

12: I was advised by MARTIN TOLCHIN, a reporter for the New York Times that he had spoken on July 15th, 1977 both with ANDY ROTHMAN, press officer for the SEC and with Chairman HAROLD M. WILLIAMS himself. I was advised that both Mr. WILLIAMS and Mr. ROTHMAN stated on July 15th, 1977 that the SEC report on New York had been delivered from the New York Regional office to the Chairman's office in Washington in seriatim and that the last portion, completing the previous seriatim deliveries was on its way from the New York Regional office to the

Chairman's office on July 15th, 1977 and was expected to be delivered before the close of business July 15th, 1977.

13: Now the words "complete report" could be used to describe any finished product which still needs merely an additional sentence or even a signature.

14: The above information as to the statements by Chairman WILLIAMS and Mr. ROTHMAN on July 15th, 1977 came to me as hearsay as far as this affidavit is concerned and I am well aware of such imperfection as to the probative value as to this information that I am trying to convey to this Court. However, it should serve as a basis for this Court to order an immediate hearing to which Mr. ROTHMAN and Mr. WILLIAMS can testify as to truth or faslity of their statements on July 15, 1977 to the reporter of the New York Times. I would further want to be in the position to subpoena the records both of the New York office and the Washington office of the SEC because any deliveries between New York and Washington were not surreptitiously made but were recorded in some fashion in both offices as to delivery and receipt.

15: There appears to be a semantic shell game with respect to both the substance and the existence of this report and as to whether or not the report is complete.

16: There is no requirement in the FOIA that the report be complete in order for this Court to order the release of the factual portions.

17: Certainly, at the very least this Court should carry out the responsibility granted to it by the Congress of the United States to have delivered to it by the SEC everyone of the thousands of pages which Mr. PITT admitted existed during our oral argument and to determine which should or should not be released to the PLAINTIFFS.

18: This Court by happenstance is in a position to perform a great service for the people of the City of New York and every appropriate judicial means should be expeditiously taken at this time to insure that the purposes of Congress in enacting the FOIA are fulfilled.

Sworn to before me this
28th day of July, 1977

Fay D Steinberg

FAY D. STEINBERG
Notary Public, State of New York
No. 31-3828193
Qualified in New York County
Commission Expires March 30, 1979

GORDON MARSHALL

SEC's timing could hurt Beame race

By JARED KOPEL

The findings of an 18-month federal investigation into possible fraud in the city's fiscal practices will probably be released just before the Sept. 8 mayoral primary, it was learned today.

The report is expected to be critical of the city's handling of its bond sales. Release of the findings by the Securities and Exchange Commissioner on the eve of the primary could affect Mayor Beame's hopes of getting renominated, especially if it is critical of the Mayor.

Disclosure of the likely release date was contained in a letter sent May 4 from SEC chairman Harold Williams to the Senate Banking Committee. The letter, whose existence was confirmed today by committee staff, said the SEC's intention was "to complete our efforts by the end of the summer."

Committee sources said this meant late August or early September.

HAROLD WILLIAMS
A revealing letter.

The SEC investigation, begun in early 1976, is trying to determine whether there was adequate disclosure of the city's worsening finances at the time $1.8 billion in short-term notes were sold in late 1974 and early 1975.

HID DATA?

The commission has heard lengthy testimony from Beame and Controller Goldin. It seeks to find out if certain city officials, major banks and other financial institutions concealed from the investing public the fact the city was running up huge budget deficits and might not be able to pay back the notes on time.

Payment of the notes was later frozen in a moratorium, which was subsequently overturned by the state Court of Appeals.

'DYNAMITE FINDINGS'

Observers agree there could be explosive political repercussions should the SEC report declare either Beame or Goldin — or both — failed to manage properly the city's finances.

But Goldin faces only minimal opposition in his reelection bid—unlike Beame.

A source familiar with the progress of the SEC investigation has said the final report would be "dynamite" and very critical of Beame and Goldin.

The political fall-out from the timing of the report's release could even reach President Carter, who pronounced Beame his "favorite Mayor" after Beame provided him with a critically-timed endorsement during Carter's campaign for the nomination.

"If the report comes out just before the primary, everyone will say that Carter double-crossed Beame. If the report comes out just after the primary, everyone will say Carter deliberately withheld it to help the Mayor," said one observer.

A POLITICAL

However, a knowledgeable Washington source said the SEC was totally "apolitical" and would not deliberately time the release to have any political effect.

The letter from the SEC to the Banking Committee followed by a few days an appearance before the panel by Williams, who was testifying on his agency's 1978 budget request.

Committee chairman William Proxmire (D-Wis.) asked Williams when the SEC inquiry would be completed. Williams, appointed chairman several weeks earlier, said he would find out.

Carey's pot has Cooke's

By PETER KEEPNEWS
and JOSH FRIEDMAN

Cardinal Cooke says he agrees with Gov. Carey that possession of marijuana should not be a crime.

What Carey intends to do, Cooke said yesterday, "is get help to people. It's important that we understand what he's saying in that light. He's not talking about legalizing marijuana, he's talking about helping people, and that's the only way to go."

Cooke made his remarks at the Hilton last night, where he received an award from the Catholic Interracial Council. It was the first time Cooke has spoken out on the issue.

Carey, who spoke at the dinner, defended his stand on marijuana.

He said pot should be decriminalized because "instead of spending $18,000 per person to put people in jail we can spend the money to keep them from falling prey to toxic substances."

Carey supports a marijuana reform bill, tabled in the Assembly last week, which would provide for a traffic-ticket-type $100 fine for anyone caught with up to one and one-quarter ounces of pot. He has asked the Assembly to reconsider the measure and has promised to support any legislator who votes for it.

In Albany, a conservative Assemblyman Vincent Nicolosi (D-Queens) proposed yesterday that people caught with less than an ounce of marijuana be given six

Jailed City aid

By EDMUND NEWTON

A man convicted of participating in a bribery scheme while serving as head of a city anti-poverty agency in 1973 has been rehired to head the $3 million-a-year program.

William Del Toro, 36, returned to his post last month as executive director of MEND (Massive Economic Neighborhood Development), an East Harlem group funded through the city's Human Resources Administration.

Del Toro, the older brother of Assemblyman Angelo Del Toro (D-East Harlem), was released from federal prison last October after spending nine months in jail.

He had been accused in 1973 of acting as a go-between in a scheme to offer bribes to an East Harlem Model Cities official in return for a $1 million lease on the Ludwig Bauman building at 2224 Third Av.

He was convicted on eight counts of conspiracy, bribery and perjury.

PAROLE BOARD

The agency's board of directors cited a certificate from the State Board of Parole in explaining why Del Toro had been rehired for the job he had been forced to leave because of the conviction.

The certificate, issued by the Parole Board after an application for it by Del Toro, in effect declares him eligible for all the rights and privileges of U.S. citizenship except the right to carry firearms.

"Del Toro was suspended until his case was resolved," said Felipe Fonollosa, chairman of the MEND board at the time he was rehired. "It was resolved when the Parole Board issued the certificate."

A MOVE TO OUST HIM

because the agency director had used his position for the commission of a felony.

Del Toro could not be

ment

State

Justice

Combatants r

Mary Beame watches the Mayo
retary of State Mario Cuomo,
Catholic Interracial Council of
pai

EXHIBIT G

WEATHER

Sunny and pleasant today, clear and cool tonight. High today near 80, low tonight in upper 50s. Sunny and pleasant tomorrow, high around 75. Sunday's and Monday's outlook partly sunny and pleasant.

Precipitation probability near zero today, 10 per cent tonight and tomorrow.

The nation's high temperature yesterday was 96 in Presidio, Texas. Today's early morning low was 30

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE CHAIRMAN

May 4, 1977

Ellen
[illegible]

The Honorable William Proxmire
Chairman
Committee on Banking, Housing
  and Urban Affairs
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

I am writing in regard to the questions you raised during last Thursday's hearing by the Subcommittee on Securities, concerning the Commission's investigation of circumstances surrounding transactions in securities of the City of New York.

This investigation, like all Commission inquiries, is necessarily non-public. However, in this case the Commission did take the unusual step of announcing the investigation, in order to minimize any general adverse impact upon the securities markets that might have resulted from disclosure of the investigation in an inaccurate or improper manner. A copy of that announcement, issued on January 8, 1976, is enclosed for your convenience.

I am sure you appreciate the complexity and difficulty of an investigation of this nature. The Commission desires to complete this investigation as expeditiously as possible and determine without delay what further action, if any, should be taken. Although there is an inherent difficulty in attempting to provide a firm date for the completion of any investigation, particularly one as complex as this one, it is our intention to conclude our efforts by the end of this summer. We will, however, make every effort to complete our work earlier.

EXHIBIT H

You may be sure that, once the invesigation is completed, the Congress, and specifically the Committee on Banking, Housing and Urban Affairs, will be completely informed of the Commission's findings. In addition, pursuant to your request, members and staff of the Committee will be given access to all supporting materials gathered by the Commission in the course of the investigation, consistent with our responsibilities to pursue any appropriate enforcement action. Naturally, if any enforcement action should be instituted, difficulties may arise pertaining to the timing of such access, but you have my assurance that we will work closely with the Committee and its staff to assist you in your important oversight and legislative functions.

The Commission appreciates the understanding you and the Committee have displayed for the difficulties connected with an investigation of this nature. We look forward, as always, to cooperating with the Committee to the fullest extent possible.

With best wishes,

Sincerely,

Harold M. Williams
Chairman

Enclosure

SECURITIES AND EXCHANGE COMMISSION
Washington, D. C. 20549

For Release 4:00 p.m.

January 8, 1976

The Commission today announced that on January 5, 1976, it issued a Formal Order of Private Investigation pursuant to Section 20(a) of the Securities Act of 1933 and Section 21(a) of the Securities Exchange Act of 1934 concerning transactions in the securities of the City of New York and related matters.

Section 20(a) of the Securities Act and Section 21(a) of the Exchange Act, in essence, authorize the Commission to conduct investigations to determine whether any violations of those Acts have occurred or are occurring.

Securities issued by the City of New York or by any municipality are not required to be registered with the Commission. However, the Commission is authorized to conduct investigations and, where appropriate, seek remedial relief where violations of the Securities Act and/or the Exchange Act have occurred in the issuance, sale and distribution of such securities.

Pursuant to its regular oversight of the securities markets, the Commission customarily conducts non-public inquiries where there have been allegations of violations of the securities laws. Normally, the existence of such inquiries is neither disclosed nor confirmed. The Commission has determined to announce the existence of this private investigation to minimize any general adverse impact upon the securities markets that might result from disclosure of the investigation in an inaccurate or improper manner. In this connection, the Commission wishes to emphasize that no conclusions have been reached, and none should be drawn, that violations of the federal securities laws have in fact occurred. The Commission notes that a major reason for its investigation is its desire to restore investor confidence in the municipal bond markets.

EXHIBIT I

0240

The Commission's investigation is also being undertaken to determine what, if any, additional legislation or rulemaking is necessary in light of the facts uncovered during the investigation to protect investors in municipal securities.

It is not expected that any further statements revealing the status of the investigation or concerning its contents will be made until the investigation is completed and the Commission has determined whether or not to seek remedial relief.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL BARNETT, *et al.*,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, *et al.*,

Defendants.

77 Civ. 3110 (VLB)

REPLY OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION TO THE PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THE ORDER TO SHOW CAUSE ENTERED BY THE COURT ON JULY 22, 1977

HARVEY L. PITT
General Counsel

PAUL GONSON
Associate General Counsel

JAMES H. SCHROPP
Special Counsel

JOHN P. SWEENEY
Attorney

Securities and Exchange Commission
Washington, D.C. 20549

WILLIAM D. MORAN
Regional Administrator
New York Regional Office
Securities and Exchange
Commission
New York, New York 10007

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, et al.,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, et al.,

Defendants.

77 Civ. 3110 (VLB)

REPLY OF THE DEFENDANT SECURITIES AND EXCHANGE COMMISSION TO THE PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THE ORDER TO SHOW CAUSE ENTERED BY THE COURT ON JULY 22, 1977

This memorandum is submitted in response to the plaintiffs' memorandum of law in support of the order to show cause, and the three affidavits of Gordon Marshall filed in support thereof. 1/ Although the plaintiffs avoid any meaningful discussion of the law, their latest papers, like the other materials they have brought before the Court in the course of this action, contain a confused blend of distortions, innuendo, and scandalous, impertinent and irrelevant matters. We feel constrained to offer this brief response.

1. Contrary to the statement made by the plaintiffs, the Commission's motion to dismiss this action on the ground of the plaintiffs' failure to pursue their administrative remedy is not a "pro forma motion" that is "totally devoid of merit;" 2/ rather, as our memorandum in support of that motion makes clear, the Court should grant the Commission's motion to dismiss, since it does not have jurisdiction over the cause of action the plaintiffs are attempting to assert. As the Commission stated in its motion to dismiss, it does not demand "formalistic compliance" with its regulations under the FOIA. But, it does

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1/ Each of Mr. Marshall's affidavits is dated July 28, 1977. Herein, Mr. Marshall's 4-page affidavit will be referred to as "Marshall Aff. I," his 5-page affidavit will be referred to as "Marshall Aff. II," and his 17-page affidavit will be referred to as "Marshall Aff. III." Plaintiffs' memorandum of law will be referred to herein as "Pl. Memo. __."

2/ Marshall Aff. III, ¶4.

require, as does the FOIA itself, sufficient compliance to provide it with notice as to the fact that access to specific records is being sought under the FOIA. The Court can acquire jurisdiction only over such suits as arise from the denial by an agency of a request made "in accordance with published rules stating the time, place, fees (if any), and procedures to be followed." 5 U.S.C. 552(a)(3)(B). The plaintiffs do not, and cannot, claim to have complied with the Commission's rules; and, as the affidavit of Harvey L. Pitt, dated July 29, 1977, makes clear, this deficiency is not cured by a belatedly-conjured reference to the substance of a discussion that never took place. A reasonable reading of the correspondence set forth in the complaint indicates that it cannot be considered to be such a request. 3/

2. But, even assuming that the plaintiffs could be deemed to have made a request under the FOIA, that request was limited solely to a "copy of the SEC Report * * *." 4/ Whatever else may be said, the plaintiffs cannot use this lawsuit to refine and expand an FOIA request they never made to include underlying law enforcement investigatory records. And, as we have repeatedly demonstrated in the only fashion of which we are aware to prove a negative—a sworn affidavit—there is no such "SEC Report."

3. In any event, the plaintiffs would require this Court to go to unprecedented and unwarranted extremes to adjudicate a suit under the FOIA, rather than follow the direction of the Supreme Court that a "flexible, common sense approach" to the FOIA should be adopted. Environmental Protection Agency v. Mink, 410 U.S. 73, 91-92 (1972). Thus, the plaintiffs would have this Court believe that, in the context of an active law enforcement

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3/ A contrary conclusion would only result in more FOIA litigation reaching the courts before the agency involved has had a fair opportunity to consider, and attempt to satisfy, demands for records.

4/ See Complaint ¶ 27; and see the Order to Show Cause drafted by the plaintiffs, and entered by this Court, with modification, on July 22, 1977.

matter, involving thousands and thousands of documents, 5/ the staff of the Commission must stay its investigation in order to compile an affidavit showing that each "single phrase, sentence or paragraph or page or document," 6/ — indeed, that every "word contained in [the Commission's] Report as to its investigation" 7/ — is exempt. This simply is not so. As the cases cited in our Supplemental Response indicate, it is only necessary to show the applicability of an exemption by affidavits, by "surrounding circumstances," by testimony, or by other means. Where, as here, the "surrounding circumstances" are clear, there is less of a burden to present additional proof. Here, there is no question that

(1) an investigation has been, and is being conducted and the report of the staff is in progress; and

(2) the document sought relates to that investigation and is, in fact, the staff's report of its investigation.

The interference that would result from premature disclosure is readily apparent from the factual circumstances, and is, moreover, amply delineated in the two affidavits filed herein by William D. Moran, the member of the Commission's staff in charge of the investigation, and the affidavit of Daniel Schatz. The Commission has thus fully met its burden of proof; there is nothing else that needs to be demonstrated to show the applicability of Exemption 7(A).

Similarly, with respect to Exemption 5, the document in question is unquestionably a pre-decisional, internal communication of the Commission used in the deliberative processes of this agency. Nothing else needs to be shown to demonstrate the applicability of Exemption 5.

There is, quite simply, nothing more to be proven. The plaintiffs' futile contentions that the Commission must do more are without basis in law or policy. Thus, they say that "the government must furnish a list of the documents being withheld" 8/ — in a case that concerns, in essence, one,

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5/ See affidavit of Daniel Schatz, dated July 28, 1977.

6/ Pl. Memo. at 9.

7/ Pl. Memo. at 10.

8/ Id.

uncompleted, document. 9/ They claim that the Court "is *required* to [examine] in camera" any withheld records, 10/ in the face of the legislative history, the cases and the plain words of the statute itself indicating that *in camera* inspection is permissive and should only be required where other means of proof are inadequate. 11/ And, they assert that the Commission should produce "segregable portions" of its documents in a context where it is clear that any premature release of *meaningful* information will result in immeasurable harm to the Commission's deliberative processes and law enforcement functions.

Finally, in a statement which perhaps captures better than anything else exactly what this lawsuit is about, the plaintiffs would have this Court believe that, in enacting the FOIA, Congress meant for "this Court *to substitute and exercise its judgment in the place and stead of the Chairman of the SEC*." 12/ That is truly the erroneous perception that has engendered this action — that, through the FOIA, this Court should assume supervisory responsibility for an ongoing Commission investigation. That is the source of the plaintiffs' often-repeated suggestion that the Court should direct the Commission to complete its investigation and release the report now, or at least before the end of the summer, and preferably, of course, before the primary election that is really their all-consuming concern. 13/

9/ While some cases have indicated that an index to withheld documents may be useful in some contexts, the plaintiffs point to no case in which such a list was required in an Exemption 7(A) context. *See, e.g.*, *Vaughn* v. *Rosen*, 484 F.2d 820 (C.A. D.C., 1973). This is not surprising, since the furnishing of a list of documents contained in an investigatory file to the subjects of an investigation would, in many cases, be just as damaging to the government's case in court as the production of the documents themselves.

10/ Pl. Memo. at 24; *see also id*. at 12.

11/ *See* the legislative history and cases cited at pp. 15-17 of the Commission's Supplemental Response to this Court's show-cause order (Jul. 28, 1977).

12/ Marshall Aff. III, ¶54 (emphasis supplied).

13/ *See*, *e.g.*, Pl. Memo at 6.

As the Court knows, however, Congress has not, in enacting the FOIA, made the district courts the supervisors of the day-to-day work of regulatory agencies. In creating this Commission, the Congress authorized it, "in its discretion," to "make such investigation as it deems necessary;" 14/ moreover, Congress empowered the Commission "in its discretion, to publish information concerning any * * * violations [of the Securities Exchange Act]." 15/ Congress did not intend, through enactment of the FOIA or otherwise, to transfer this authority, or this discretion, to the courts.

The Court should, therefore, decline the plaintiffs' invitation to involve itself in an active, ongoing, investigatory proceeding of the Commission. As the Court of Appeals for the First Circuit has wisely held:

> "the FOIA is sufficiently flexible to accomodate the agency's interests in swift and effective enforcement proceedings by allowing it to withhold certain information temporarily without close judicial supervision."

New England Medical Center Hospital v. National Labor Relations Board, 548 F.2d 377, 385 (C.A. 1, 1976) (emphasis supplied). Like the court in New England Medical Center, this Court should decline to interfere with the Commission's investigatory proceeding by ordering a pointless in camera inspection of records relating to an active investigation, and should reject the plaintiffs' attempt to obtain the premature public release of those records merely because they believe it would be politically advantageous for them.

4. The scandalous, impertinent, irrelevant and incompetent matter contained in the plaintiffs' most recently filed affidavits provide confirmation that the award of costs and attorneys' fees to the Commission is needed to do justice in this case. We will not burden the record further by recounting the full history of the plaintiffs' many improprieties committed in the process of conducting this frivolous litigation. But, the Commission protests, in the strongest terms, the unseemly collection of false statements,

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14/ Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a).

15/ Id.

misstatements, slanderous charges, innuendo, conjecture, self-generated press clippings, and unattributed hearsay that the plaintiffs bring before the Court in the guise of "factual" affidavits, all in the sole interest of advancing the political fortunes of one of the plaintiffs. 16/ Their conduct of this litigation has been intolerable. Under the "bad faith" standard of Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-259 (1975), the award of attorneys' fees in response to such behavior is appropriate, and we again ask the Court to award the Commission its costs of defending this publicity play that masquerades as a bona fide lawsuit.

Respectfully submitted,

HARVEY L. PITT
General Counsel

JAMES H. SCHROPP
Special Counsel

JOHN P. SWEENEY
Attorney

WILLIAM D. MORAN
Regional Administrator
Securities and Exchange
Commission
26 Federal Plaza
New York, New York 10007
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Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549
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16/ The plaintiffs make the point that a person requesting access to records under the FOIA is not required to show a need for the disclosure, and claim that the fact that their suit is motivated by political and publicity concerns is "irrelevant." Pl. Memo. at 21.

Those facts may well be irrelevant to the merits of the suit, although it does point up one reason why they are not entitled to the report, since (as the Commission pointed out in its Supplemental Response), if the plaintiffs can obtain the draft report, "any person" can obtain it, even a potential defendant in a law enforcement action. 5 U.S.C. 552(a)(3) But, these considerations are not immaterial to the Commission's request for costs and attorneys' fees. The fact is that this litigation is a severe abuse of the judicial process, which should be looked upon most unfavorably.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, *et al.*,
Plaintiffs,
v.
SECURITIES AND EXCHANGE COMMISSION,
et al.,
Defendants.

77 Civ. 3110

CERTIFICATE OF SERVICE

I, JOHN P. SWEENEY, hereby certify that:

1. I am over 21 years of age and employed by the United States Securities and Exchange Commission as an attorney in the Office of the General Counsel.

2. On the 29th day of July, 1977, I caused to be served a copy of the defendant Securities and Exchange Commission's Reply To The Plaintiffs' Memorandum Of Law In Support Of The Order To Show Cause, and the affidavits of Harvey L. Pitt, James H. Schropp and Daniel Schatz, by mail, addressed

Gordon Marshall, Esquire
60 East 42nd Street
New York, New York 10017
Attorney for Plaintiffs

JOHN P. SWEENEY
Attorney

Securities and Exchange Commission
Washington, D.C. 20549
Telephone (202) 376-8003

Dated: July 29, 1977

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION AND
EXECUTIVE OFFICE OF THE PRESIDENT OF
THE UNITED STATES,

Defendants.

77 Civ. 3110 (VLB)

DISTRICT OF COLUMBIA, ss:

HARVEY L. PITT, being duly sworn, deposes and says:

1. I am the General Counsel to the Securities and Exchange Commission (the "Commission"). I make this affidavit on personal knowledge in response to the sworn affidavits which the plaintiff Gordon Marshall filed with the Court on July 28, 1977, in support of the plaintiffs' motion to show cause, pursuant to which an order was entered by the Court on July 22, 1977.

2. While I regret the necessity of submitting an affidavit on points irrelevant to the disposition of this case, the unsupported allegations in the sworn affidavit of Mr. Marshall, attacking the veracity of representations that I made to the Court at the hearing in this case held on July 26, 1977, cannot be left unanswered in the record of this action.

3. Contrary to the representations set forth in Mr. Marshall's affidavits, */ no discussion of the Freedom of Information Act ("FOIA") occurred in the course of the telephone conversation which I had with Mr. Marshall on May 2, 1977. In fact, prior to the time this action was filed, I had no discussions, oral or written, with Mr. Marshall concerning any aspect of the FOIA.

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*/ Each of Mr. Marshall's affidavits is dated July 28, 1977. Herein, Mr. Marshall's 4-page affidavit will be referred to as "Marshall Aff. I," his 5-page affidavit will be referred to as "Marshall Aff. II," and his 17-page affidavit will be referred to as "Marshall Aff. III."

4. I did not discuss the possibility of litigation under the FOIA, or otherwise, with Mr. Marshall during the telephone conversation of May 2, 1977, or at any other time; nor did I ever request that he inform me in advance of instituting any litigation.

5. I did not discuss with Mr. Marshall the proper procedure for suing the Commission under the FOIA, or otherwise, during the telephone conversation of May 2, 1977, or at any other time.

6. The sole telephone conversation I had with Mr. Marshall occurred on May 2, 1977. Thereafter, on May 11, 1977, Mr. Marshall sent a second letter to me concerning the candidacy of his client, Joel Harnett, and his request for a copy of the Commission's report on its investigation in the matter of New York City. (See Complaint ¶27.) Revealingly, at no point in that letter did Mr. Marshall mention the FOIA or conform to the Commission's rules governing requests under that Act, 17 CFR 200.80. Had Mr. Marshall and I discussed the FOIA during our brief telephone discussion of May 2, 1977, my letter of May 6, 1977 (see Complaint ¶28), his subsequent letter of May 11, 1977 (see id., ¶34), and my final letter of May 20, 1977 (see id., ¶35), surely would have referred to that Act.

7. Mr. Marshall's confusion about our discussion on May 2, 1977, is further evidenced by his assertion that he asked me whether he was required to sue the individual members of the Commission or the full Commission, in a suit under the FOIA. (See Marshall Aff. I, ¶8.) I had no such discussion with him. Mr. Marshall did, however, have such a discussion with James H. Schropp, an attorney on my staff, shortly before Mr. Marshall filed his lawsuit. It was in that conversation with Mr. Schropp that Mr. Marshall raised his questions concerning the identity of the defendants in an FOIA suit. A separate affidavit from Mr. Schropp attests to this fact.

8. Mr. Marshall has now asserted that the fact that I replied to his letters to Chairman Williams "demonstrates [that neither] the importance of [his] letter nor the subject matter of [his] letter were lost upon Chairman Williams, Mr. Pitt and their staff" (Marshall Aff. III, ¶10), although at the time he certainly was piqued at not receiving a reply directly from the

Chairman. (See Complaint ¶ 34.) Yet, I handled that correspondence simply because I am assigned the responsibility of responding to all inquiries relating to on-going investigations. If Mr. Marshall's letters had been considered FOIA requests, as he implies, then those letters would have been referred to the Commission's FOIA Officer in accordance with the Commission's rules set forth at 17 CFR 200.80(d)(9)(ii).

9. In a separate affidavit filed by Mr. Marshall in opposition to the Commission's motion to dismiss this action, Mr. Marshall asserts that my representation to the Court — that there is no completed report of the staff's investigation — is untrue because, "in view of [Mr. Marshall's] sources Mr. Pitt either does not know or does not want to know the present status of the SEC report and its readiness for release." (Marshall Aff. III, ¶40.) Those statements are not only false, they are scandalous, and an unwarranted attack on the integrity of my representation to this Court. I have followed closely the progress of the City of New York investigation since its inception and I am personally familiar with the status of the preparation of the New York Regional Office's report. My representations to the court were based upon my personal knowledge, as well as the affidavits of Mr. Moran.

10. Mr. Marshall has relied heavily in his affidavits upon the unsupported statements of unidentified "sources." (See Marshall Aff. III, ¶¶17, 38, 39, 40.) Yet, in citing the admittedly hearsay statements (see Marshall Aff. II, ¶14) of the only source he identifies by name, a newspaper reporter, who had allegedly attributed certain statements to Chairman Williams (see Marshall Aff. II, ¶2; Marshall Aff. III, ¶18), Mr. Marshall omits any reference to Chairman Williams' recent letter to the New York Times concerning the allegations of political influence which that same reporter had raised in two newspaper articles. A copy of Chairman Williams' letter, as it appeared in the New York Times on July 26, 1977, is annexed hereto as Exhibit A.

11. As I noted at the outset, an unseemly cross-fire of personal attacks on opposing counsel is anathema to my preferred conduct of litigation. Despite the exigencies of a political campaign in which Messrs. Marshall and Barnett are actively involved, there is no justification for

(a) abusive attacks on the veracity of my representations to this court;

(b) allegations of wrongdoing on the part of the Commission and its Chairman; and

(c) the issuance of press releases concerning this litigation solely for the purpose of generating publicity for Mr. Barnett.

The crass political motivations that underlie this lawsuit, its total lack of merit, and the offensive manner in which it has been conducted, warrant an award to the Commission of the expenses incurred in defending this action, including the award of reasonable attorneys' fees.

Harvey L. Pitt
HARVEY L. PITT

Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Subscribed to and sworn before me
this 29th day of July, 1977

Notary Public, D.C.

My Commission Expires Dec. 14, 1978

On the S.E.C. Report on City Finances

NYT 7/26
P.28

To the Editor:

Three months is not a great deal of time to come to know an agency of some 2,000 people. Nevertheless, in the three months that I have been chairman of the Securities and Exchange Commission I have developed a great respect for the integrity, ability and dedication of my fellow commissioners, and of the members of the commission's staff. It is not hard to see why the commission has consistently been identified as the best of the independent regulatory agencies.

It is therefore with real sadness that I have read two recent news articles which, without any foundation in fact, impugn the integrity of this commission and its staff.

In articles published July 18 and 19, reporter Martin Tolchin asserts that the commission has made a decision not to issue any report on its investigation of circumstances surrounding the sale of City of New York securities until after the September mayoral primary election. Furthermore, through innuendo and artful juxtaposition, these articles imply that the reason for this alleged decision was a desire by the Carter Administration to assist a political ally. These extremely serious and damaging assertions are absolutely unsupported and unsupportable.

The truth is that the commission has not made any such decision and will release the New York City report as soon as it is completed. There has been no attempt whatsoever by anyone from the Carter Administration to exert any influence with respect to any aspect of the report, nor in fact have they even made any inquiry about it. I told all of this to Mr. Tolchin quite clearly prior to the publication of his first article. Our staff is continuing to work on what has been an extremely difficult and complicated investigation. The findings of the commission will be released to Congress and the public at the earliest possible time consistent with our responsibilities under the Federal securities laws.

During the 43 years of its existence, the commission has built and maintained, sometimes in the face of very great pressure, a reputation for integrity, effectiveness and independence of political considerations. It is only by virtue of the authority which such an unblemished reputation affords that an agency as small as the commission has been able to do such an effective job of assuring the integrity of our capital markets, which are recognized as the finest in the world. I am saddened, and more than a little angered, that the integrity of this agency should be put into question without factual basis. And I am at a loss to understand how one of the leading newspapers in the world could allow itself to be compromised in this fashion.

HAROLD M. WILLIAMS
Chairman
Securities and Exchange Commission
Washington, July 21, 1977

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION and
EXECUTIVE OFFICE OF THE PRESIDENT OF
THE UNITED STATES,

Defendants.

77 Civ. 3110 (VLB)

DISTRICT OF COLUMBIA, ss:

JAMES H. SCHROPP, having been sworn, deposes and says:

1. On or about Friday, June 24, 1977, I had a telephone conversation with the plaintiff Gordon Marshall. Mr. Marshall, I was informed, had telephoned Mr. Pitt, and in his absence, Mr. Marshall was referred to me.

2. During the course of our conversation, Mr. Marshall informed me that he was going to bring suit against the Securities and Exchange Commission pursuant to the Freedom of Information Act, and he inquired as to the appropriate procedures for filing an action against the Commission, including what parties should be named and served in the action.

3. I responded that, in accord with the provisions of the Freedom of Information Act, a suit under that Act should be brought against the Commission alone, without also naming the Commissioners or members of the staff.

JSchropp
JAMES H. SCHROPP

Securities and Exchange Commission
500 North Capitol Street
Washington, D. C. 20549

Subscribed to and sworn before me
this 29th day of July, 1977

Notary Public

My Commission Expires September 14, 1978

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK

0254a

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs,

v.

77 Civ. 3110 (VLB)

SECURITIES AND EXCHANGE COMMISSION and
EXECUTIVE OFFICE OF THE PRESIDENT OF
THE UNITED STATES,

Defendants.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

DANIEL SCHATZ, having been sworn, deposes and says:

1. I am an employee of the Securities and Exchange Commission (the "Commission") assigned to the Commission's New York Regional Office in the capacity of Securities Compliance Examiner.

2. I am currently assigned to act as custodian of the documents gathered for use in the pending investigative proceeding captioned, In the Matter of Transactions in Securities of the City of New York and Agencies of the State of New York, File No. NY-5147 ("City investigation").

3. I have previously performed similar functions as the custodian of documents in other cases and investigations conducted by the Commission, as well as cases conducted by the United States Attorney for the Southern District of New York.

4. The information set forth below is based upon my current efforts respecting the City investigation, my survey of the document room in the City investigation and my discussions with the attorneys and examiners assigned to the City investigation.

5. The New York Regional Office's investigatory files in the City investigation consist of approximately 100,000 documents, which are

contained in approximately 31 file drawers, 7 file cabinets and numerous cartons and file folders. In addition, there are 92 volumes of transcripts of testimony aggregating well in excess of 12,000 pages. Documents in the Commission's investigatory files range in size from single page items to booklets and books; many of the documents exist in original form only, or there is only one copy contained in the files. Included in the material are documents which consist, in whole or in part, of compilations, summaries, analyses, recommendations and opinions of members of the staff.

6. In addition to the foregoing, other documents amassed during the Commission's investigation are currently distributed among the staff members working on this matter and must be returned to the central filing system. These documents will increase the numbers already referred to.

DANIEL SCHATZ

New York Regional Office
Securities and Exchange Commission
26 Federal Plaza
New York, New York 10007
(212) 264-4121

Subscribed to and sworn before me
this ___ day of July, 1977

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

JOEL HARNETT, et al,

Plaintiffs,

-against-

SECURITIES AND EXCHANGE COMMISSION,
et ano,

Defendants.

- x

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' ORDER TO SHOW CAUSE AND IN REPLY TO THE SUPPLEMENTAL RESPONSE OF THE SECURITIES AND EXCHANGE COMMISSION

GORDON MARSHALL
30 East 42nd Street

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs,

77 Civ 3110 VLB

-against-

SECURITIES AND EXCHANGE COMMISSION
and EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

Defendants.

- X

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PLAINTIFFS' ORDER TO SHOW CAUSE AND IN REPLY TO THE SUPPLEMENTAL RESPONSE OF THE SECURITIES AND EXCHANGE COMMISSION

PRELIMINARY STATEMENT

Plaintiffs are shocked and saddened by the cavalier treatment of the court by the defendant SECURITIES AND EXCHANGE COMMISSION (hereinafter referred to as "SEC").

The SEC has demonstrated by its memoranda submitted in this action its complete intention to by-pass this Court, to ignore the mandate of Congress that the United States

District Judge sitting on this matter shall have jurisdiction *de novo* to determine what should or should not be withheld.

The supplemental response as well as the initial memorandum of the SEC constitutes an exhibition of verbal gymnastics in an attempt to obfuscate the issues and to cloud the absolute inability of the SEC to meet its burden in sustaining withholding of any or all of the fruits of its investigation.

It should further be noted that the Executive Office of the President of the United States has not taken a position in opposition to the relief requested by the plaintiffs.

The fact that at least four attorneys at various hierarchical levels of the SEC have worked on the memoranda should once and for all dismiss the facetious tongue in cheek claim of the SEC that this action is frivolous.

Furthermore, it should be noted that the plaintiffs are not publicity seekers and have no ulterior motive other than the immediate release of the non-exempt material in the hands of the SEC at this time.

BEST COPY AVAILABLE

The release of the SEC Report and the information which the SEC has gathered over the last 19 months is probably one of the most burning and critical issues relating to the government of the City of New York, the finances of the City of New York and the people of the City of New York. It is no wonder then that all of the radio and television media and the press, both locally and nationally, and both reporters and columnists, are vitally interested in the reasons for the unfathomable delay in the release of the SEC Report and results and facts discovered in its investigation. The plaintiffs are not creating the publicity nor seeking it.

Rather, it is the SEC, by its extraordinary insensitivity and foot dragging, which has generated the extraordinary interest of the press, media and public with respect to the substance of the investigation and the failure to make a full disclosure to the public in time for the public to have the facts and make an intelligent use of their voting privileges.

Nowhere in this action has the SEC, with anything which could be characterized as candor, explained why it tells the court that no such Report exists or some such other obfuscation by means of semantic slight of hand, while on the other hand the Chairman of the SEC represents in writing to Senator Proxmire that the Report will be released no later than the end of August and acknowledges within two months thereafter to a well-respected reporter affiliated with the Washington Bureau of the New York Times that the last section of the Report is being delivered and received in Washington from the New York Regional Office on July 15, 1977; all earlier sections of the Report having already been prepared, written and delivered in seriatim.

Although the papers submitted by the SEC are voluminous, they seem to deal with both this Court and the plaintiffs as if they were immature infants, able only to digest the pablum which the SEC insists upon feeding them.

Mr. James H. Schropp telephoned the office of Gordon Marshall at approximately Noon on July 26,1977 to discuss the exchange of the initial memoranda which were required to be filed with the court on July 28,1977.

During this discussion Mr. Marshall asked Mr. Schropp whether or not the SEC had come to any conclusion with respect to the suggestions made by Judge Broderick from the Bench at the conclusion of oral argument on July 26, 1977 that the SEC consider whether or not it will voluntarily submit to Judge Broderick copies of whatever documents exist or a list of whatever documents and other material exist for the guidance of the Court in arriving at a decision, such material to be submitted in camera.

Mr. Schropp replied that the SEC was going to reply to the Court that it had determined that it would not give any material or information relating to the investigation to the Court in camera.

This arrogance of the SEC in flouting the intention of Congress by misapplying the case law and refusing to give this Court any information upon which this Court can exercise its broad discretion should now be met by this Court exercising the responsibilities placed upon this Court by Congress pursuant to Section 552(a)(4)(B).

This can only be done by granting plaintiffs' order to show cause in its entirety.

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PLAINTIFFS' COMMENTS WITH RESPECT TO THE SUPPLEMENTAL RESPONSE OF THE SECURITIES AND EXCHANGE COMMISSION

On page 2 the SEC refers to plaintiffs' motion as an extraordinary motion to show cause. There is nothing extraordinary about an order to show cause and there is nothing which prevents an order to show cause from having been made before an answer is interposed. Section 552(a)(4)(B) gives the district court jurisdiction both to enjoin withholding, and to order the production of records on the filing of the complaint and to take all of the action requested in the order to show cause upon the filing of the complaint and places the immediate burden on the agency to sustain its action in withholding any document from the complainant. Subdivision (C) of said section allows the court to direct the response from the defendant for good cause shown in less than thirty days. Subdivision (D) provides that this proceeding is supposed to take precedense on the docket over all cases (except as to cases the court considers of greater importance) and provides that the case shall be assigned for hearing, trial or for argument at the earliest practicable date and expedited in every way.

This clearly shows an intent on the part of Congress that there be absolutely no delay whatsoever with respect to the issues raised in this action. For the SEC to characterize plaintiffs' attempt to have an immediate resolution by means of a simple order to show cause "as extraordinary" is to do the SEC and its great tradition a gross disservice since it constitutes a deliberate distortion of Section 552 and is but one example of the distortions and misleading citations attempted to be foisted upon this Court by the SEC. By means of example only, since it is almost impossible to go into all of the cases cited by the SEC within a 24 hour period, the SEC has cited Environmental Protection Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, for the proposition that the Supreme Court did not enforce in camera inspection provisions and that therefore the Court should not resort to in camera inspection in the case at bar. The Mink case involved documents pertaining to underground atomic explosions, which documents were classified "top secret" or "secret" pursuant to Executive Order and such documents therefore were exempt under the specific provisions of Section 552 (b)(1)(A) and (B).

information which the SEC unilaterally seeks to withhold from the public is not classified as either secret or top secret and neither the Executive Office of the President of the United States nor the SEC has demonstrated that the withholding is pursuant to an Executive Order in the interests of national defense or foreign policy. Mr. Justice White held that the fact that the documents were specifically excluded from the operation of the Act precluded compelled disclosure of the documents. Such case is not at all analagous to the case at bar. It reveals the weakness of the SEC's position that it has to resort to such a device in order to give the illusion of case law support for its untenable position.

Although the SEC nakedly asserts at page 2 that the plaintiffs have failed to pursue or exhaust their administrative remedies, the plaintiffs are in this Court because the Act specifically provides that the failure of the SEC to have made a determination within ten days and failing within such time to notify the person making the request of its determination and the reasons therefor and the right of such person to appeal to the head of the agency any adverse determination cloaks the person making the request with the benefits of Section 552(a)(6)(C), which states that such person making the request "shall be deemed to have exhausted his administrative remedies with respect to such request".

There is nothing in the Freedom of Information Act (hereinafter referred to as FOIA) which limits this Court's competence to deal merely with those "portions of the draft report which are in existence at the present time."

Similarly there is nothing in the Act which restricts the plaintiffs in litigation from demanding all (or the non-exempt part of) investigatory records relating to the matter of the New York City investigation as a variance from what was demanded in the initial letter of Mr. Marshall to the Chairman of the SEC.

Curiously, the SEC uses the initial letter of Mr. Marshall in this context at page 2 of its supplemental brief as a definitive unambiguous demand as far as the description of what is sought and now seeks to narrow the jurisdiction of the Court to the specific terms of that request, while on its motion to dismiss, the SEC, in its usual contradictory fashion, seeks to persuade the Court that the letter is unclear and non-descriptive of the documents which it seeks.

The brief of the SEC is merely an act of sophistry. A demand for all of a report includes the release of portions of the report and, indeed, this Court has been given the power, jurisdiction, right and obligation to look at all of the documents in camera and if need be to "disentwine" the exempt from the non-exempt portions. The statute and case law interpretations require this Court at all times to act in favor of the presumption supporting disclosure and to use a special master if need be to assist the court in determining whether anything should be withheld as exempt

Plaintiffs were served with a copy of an affidavit of William D. Moran attached to its supplemental response dated July 28, 1977. The affidavit is unsigned, undated and unsworn to. As such it should have no probative value whatsoever!

The plaintiffs still challenge Mr. Moran to describe and deliver copies to this Court of whatever New York Regional reports were delivered by him in seriatim to the Chairman of the SEC in Washington, D. C. with the final portion having been delivered by Mr. Moran or his office to Chairman Williams on or about July 15, 1977. Nowhere has Mr. Moran explained his statement to counsel for the plaintiffs in the presence of Frank Lombardi, a reporter of the New York News on or about May 5, 1977 that nine out of ten sections of the Report had been completed as of that day and that only the resignation of the then attorney in charge of the investigation, Mr. Hylands, had delayed the then completion of the final portion of the Report. The draft of Mr. Moran's undated, unsworn and unsigned affidavit is at complete variance with those known facts.

Accordingly, this Court should not accept the statement prepared in Mr. Moran's name and should direct the SEC to deliver to this Court immediately copies of all of the documents in the SEC's possession relating to its investigation so that this Court can make its own determination as envisioned by Congress _de novo_.

Neither of the purported affidavits of Mr. Moran (one under oath and the other not even signed by him) begins to meet the government's burden to prove any exemption it desires the Court to enforce by probative evidence relating specifically to specific documents, phrases, paragraphs, etc.

The supplemental response of the SEC dated July 28, 1977 goes even further than Mr. Pitt's position in oral argument on July 26, 1977.

In oral argument Mr. Pitt conceded in response to Mr. Marshall's argument and the Court's close questioning that neither Exemption 5 nor 7 was a broad blanket exemption. In the supplemental response, however, the SEC has now changed its tactics and shifted its argument to urge upon this Court its position that the exemptions under subdivision (5) and under subdivision (7)(a) apply to every scrap of paper every word and every piece of writing in the possession of the SEC relating to its investigation of New York City.

In passing it should be noted that the SEC claims exemption under Section 552(b)(7)(A) and does not now claim exemption under subdivisions (7(B), (C), (D), (E) and (F). They have not identified a single document so that this Court could intelligently rule; they have not identified a single potential defendant; they have not indicated what agency would be called upon for any law enforcement purposes, nor have they cited a single law which they claim has been violated and should be enforced.

Indeed, none of these allegations are even contained in an S.E.C. affidavit; they are merely part of a narrative contained in a memorandum which has no probative value whatsoever.

What enforcement proceedings; against whom, for what reason?

How on earth can the SEC claim that every single one of the thousands of pages which Mr. Pitt conceded existed are all completely shielded by subdivision (5) and subdivision (7)(A) exemptions. I know for a fact that the plaintiff Joel Harnett was interviewed by the SEC and the SEC graciously conceded in its supplemental response dated July 20, 1977 in footnote 3 at page 4 that plaintiffs herein are, of course, not the subject of the Commission's investigation in the matter of the City of New York. Does Mr. Pitt really intend to continue the charade that every page of information obtained from Mr. Harnett will be used for law enforcement purposes or constitutes an intra-agency communication from one member of the agency to the other which would not be available by law to any person?

Such a ridiculous distortion and perversion of Section 552 by the SEC in its argument to this court is unspeakable and indigestible.

The SEC discussion of the various amendments to Exemption 7 enhance and support the plaintiffs' position that the exemption was amended in order to liberalize the disclosure rather than restrict disclosure. The statement of the SEC at page 3 as to an alleged significant difference between the status of investigatory records after law enforce action has been concluded is not borne out nor are supported by the case law nor by the statute. The time such records exist is not relevant under the Act. The government must clearly demonstrate at any time that the specific record, document or paragraph or word sought to be deleted or withheld squarely comes under the claimed exemption by competent probative proof either by means of affidavits, or oral testimony specifically relating in detail to the matter claimed to be exempt or by in camera inspection by the court.

The SEC must prove each and every exemption with respect to every word sought to be withheld by competent jurisdiction. The SEC's naked conclusions are, as a previously case indicated "woefully inadequate".

A statement by Senator Hart, a single senator, is not binding upon this Court. Indeed, case law interpretation is more binding than Senator Hart's single speech. No litigant or prospective defendant in a criminal case has been identified and no basis has been shown that there are to be such defendants. Indeed, the press release of the SEC of January 8,1976 and the letter of Chairman Williams to Senator Proxmire of May 4,1977 (Exhibits "H" and "I") lead one to the inescapable conclusion that "law enforcement" was not one of the purposes of the publicly announced investigation.

The government has been unable to point to any enforcement proceeding in existence or contemplated which would be harmed by disclosure of the facts at this time.

The SEC would have this Court apply exemption 7 as it had been interpreted prior to its amendment.

Curiously, the SEC has used the phrase (on the third line of page 6 of its supplemental memorandum) "stone wall".

They are attempting to stone wall this motion and the efforts of this Court in preventing this Court from examining the subject matter of this action in camera.

The SEC is attempting to cause an interpretation of Exemption 7 as Exemption 7 was interpreted by Senator Hart prior to the amendment. Senator Hart stated that "The court would have the exemption applied without the need of the agency to show why the disclosure of the particular document should not be made" and Senator Hart further stated "That ... is not consistent with the intent of Congress when it passed this basic Act in 1966". It was to prevent the stone walling by an agency that the amendment further prevented broad blanket use of Exemption 7. Even under the old law, before the amendment, the agency had to show that the document sought was in an investigatory file compiled for law enforcement purposes. In the case at bar the SEC refuses to even identify any of the documents.

The SEC clearly wants us to go back to 1966 and ignore all of the amendments limiting the SEC's right to unilaterally declare that the entire file is a "no man's land" which it forbids even this Court to see, in defiance of Congress.

The SEC must show a harmful effect with respect to a real potential enforcement proceeding, which the SEC has utterly failed to do. The SEC must show much more than a vague concept of in future possible enforcement when its own press release never mentioned enforcement as a purpose of the investigation.

Similarly, the cases cited by the SEC in order to protect the entire Report under the exemption of subdivision (5) are inapplicable since there is no basis on the record for the SEC to sustain a subdivision (5) exemption with respect to every one of the thousands of pages which Mr. Pitt admits exists at the present time.

A similar misuse of citations by the SEC occurs at page 9 of its brief in which the SEC makes a naked assertion that Kent Corp. vs NLRB, 530 F.2d 612 (C.A.5 1976) allegedly stands for the proposition that a report of investigation is an intra agency memorandum which qualifies for the protections afforded by Exemption 5.

In actuality, the Court in the Kent case held that the reports were in their entirety exempt since no reasonably segregable portion of the documents remained after those parts protected by the attorney work policy were determined. There is no showing in the case at bar that the factual fruit product of the investigation is not segregable from any predecisional communication.

Indeed, the very case cited by the SEC (*Kent*, supra) also stands for the proposition (at page 624) that the court should be prepared to employ a judicious blend of affidavit evidence, oral testimony and in camera inspection. Indeed, the Court went further and stated at page 624:

> "We do not hold that the 'Final Investigation Reports" of NLRB Regional Office are always wholly within attorney work-product privilege." (Emphasis add

The Court suggested affidavit evidence, oral testimony and in camera inspection and other extrinsic evidence as to whether any portions of the records could be disclosed without blending work product rule policies. Indeed in the Kent case the court also stated at page 624 that it had conducted an actual examination of the documents and was convinced from such actual investigation by the court that such documents were protected in their entirety by Exemption 5.

Nowhere in the FOIA is there authority for the SEC to substitute and appropriate to itself for the functions which Congress specifically requires the district court to perform.

Plaintiffs see no authority for the in camera inspection and conclusions to be made by the SEC or any other government agency when their withholding of documents are called into question under the FOIA. Were it true, there is no need for judicial review de novo!

The attempt by the SEC to cite cases in the remainder of its brief to support blanket exemptions with respect to every document which Mr. Pitt admitted existed without making the Court a participant in such determination, without offering any evidence under oath by affidavit or oral testimony, by mere conclusory statements constitute an absolute abandonment by the SEC of any effort to properly sustain its burden of proof as it was required to do by Congress and this Court should now order the immediate release to the plaintiffs of every document in the possession of the SEC.

To do otherwise would condone the obviously dilatory exercise in which the SEC is forcing this court and the plaintiffs to participate."

How can the SEC, on one hand, claim that *everything* is *exempt* while the Chairman of the SEC has been stringing along Senator Proxmire to believe that the *entire* Report will be *released* before the end of the summer? or sooner? How could the SEC promise Senator Proxmire that it would *release* the Report not only by the end of the summer, but possibly sooner, if the entire Report should not be released as an unauthorized disclosure under either Exemption 5 or 7?

CONCLUSION

The order to show cause should be granted in its entirety.

Dated, New York, New York
July 28, 1977

Respectfully Submitted

GORDON MARSHALL
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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JOEL HARNETT, SAVE OUR CITY, INC.,
and GORDON MARSHALL,

Plaintiffs,

77 Civ. 3110

- against -

SECURITIES AND EXCHANGE COMMISSION,
EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNTIED STATES,

Defendants.

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New York, New York
August 1, 1977, 4:15 p.m.

Before:

HONORABLE VINCENT L. BRODERICK,

District Judge.

Appearances:

GORDON MARSHALL, ESQ.
Attorney for Plaintiffs

HARVEY PITT, ESQ.
JOHN P. SWEENEY, ESQ.
MARVIN JACOB, ESQ.
JEROME L. MERIN, ESQ.
Attorneys for Defendant Securities and
Exchange Commission

Appearances (Cont'd):

ROBERT B. FISKE, ESQ.
United States Attorney for the
Southern District of New York
Attorney for Defendant Executive Office of
the President of the United States

BY: MICHAEL DOLINGER, ESQ.
Assistant United States Attorney.

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(Case called.)

THE COURT: Gentlemen, considering this matter various problems have presented themselves. Let me just run over them.

One of them has to do with the type of request that was made by the plaintiffs to the SEC. The request was for a report under the Sunshine Laws. There was no reference in the request to the regulations of the SEC having to do with the Freedom of Information Act, and the letter was not put into the channels within the SEC that normally would have sparked a Freedom of Information Act response.

Now, Mr. Marshall, in dealing with this the other day, said that he left off the label and that was it, but it was really a great deal more than that, because as I see it there has been no decision made within the

SEC itself as to what to do about Mr. Marshall's demand.

The request, or demand, did not get into the Freedome of Information Act channels, and so there was no formal denial by the Freedome of Information officer, and, hence, there was no triggering of the appeal provisions of the SEC regulations, and I presume no consideration by the Securities and Exchange Commission itself of Mr. Marshall's request.

Now, Mr. Pitt did not address himself to this the other day. Mr. Marshall's position, as I understand it, is that when you direct such a demand to the very highest levels of the SEC through a letter to the chairman of the SEC which is responded to by the general counsel to the SEC, you would expect that if there is a technical flaw, it would be brought to your attention.

I would expect this would be particularly so since I received in the mail just within the last couple of days an announcement of a panel on the Freedom of Information Act, and one of the principal panelists is the general counsel of the SEC.

Let me address this question to you, Mr. Pitt. Has there been any consideration by the Securities and Exchange Commission of Mr. Marshall's request and any decision made on a Commission level not to respond to that request.

MR. PITT: No, your Honor. The request was never channeled as a Freedom of Information Act request. It was never treated as a Freedom of Information Act request. The members of the Commission never voted upon it as a Freedom of Information Act request or otherwise.

The Commission, however, is apprised of this pending litigation, of course, and is aware of the positions we have articulated in defense of the Commission's position.

THE COURT: Has it authorized those positions?

MR. PITT: The Commission does not authorize specific positions to be taken when it is sued unless there is something novel or unique.

The Commission is aware we have asserted that no Freedom of Information Act request was ever made, received or processed by the Commission.

THE COURT: So far as I am concerned, while this request has major technical flaws, it was also clearly identifiable from the language used in the letter it was a request made under the Sunshine laws as a Freedom of Information Act request, and the fact that it did not get into the proper channels, I believe, is primarily the responsibility of the plaintiff for not having done the exhaustive research before he sent the letter that he has done since he sent the letter. But I think there was some responsibility on the part of the Commission itself, because it seems to me the letter was so clearly a Freedom of Information Act letter that if Mr. Marshall was not informed he should have been informed.

I have been very troubled by the papers that have been filed in this case. I think there has been too much name-calling on both sides, and I think it is a very unhealthy way to conduct any sort of litigation.

One reason I wanted to have this hearing was to try to find out some things which I must say I am not informed about by the volumes of papers that I have been blessed with.

I have been troubled, among other things, by the in terrorem approach that the SEC has taken. I though I made it perfectly clear at our last hearing that while I was not at that point going to call for any sort of an in-camera presentation that I wanted to know precisely what the status was of this report, and I wanted to know why, specifically, I should not, as a District Judge, order the production of the report.

What I received was general statements about law enforcement, general statements about exemptions as intra-agency communications, statements about the numbers of file cabinets involved, which I take it was designed to discourage my further inquiry into the possibility of in-camera inspection, and I found all of that not very helpful. Neither did I find helpful the exchange of affidavits with respect to what was or was not said in a given telephone conversation, and I don't intend to pursue that further in this matter.

What we are dealing with is a request which has been made for a report. It's a report that the SEC announced some hear and a half ago. I don't believe a year and a half is a long time for a security investigation, and I would be very surprised if a definitive report on a matter as complex as New York City municipal bonds and their marketing could be produced in a year and a half.

But there have been statements made by people in the SEC, by the chairman of the SEC, to Congress that this report is under way and that will be made available as soon as possible.

I don't find in any of the papers that have been submitted to me anything which gives me any information at all with respect to what the status of the report is. What I glean from the papers and our discussion the other day is that there is no report in the sense that there is no report that has been issued by the SEC. I think we all know that, or we wouldn't be here.

What there is, apparently, is a report in process from the New York Regional office which is either complete or not complete, which has either been submitted or not submitted, or which may have been submitted in part and not submitted in part. I take it then there are those 90,000-odd files of underlying documents.

I have been given no showing as to why under either the Sub-paragraph 5 or Sub-paragraph 7 exemptions this should be exempt for conclusory statements, that it should be because it's either reports from the regional office or either intra-agency or because they are law enforcement.

There has been no showing to me what law enforcement interests are involved or how disclosure of all or any part of this report would deter those interests

With respect to both exemptions, I am very much aware that the act, the Freedom of Information Act, says with respect to all of the exemptions that any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions which are exempt under this sub-section.

The SEC's position apparently is that there is nothing which is segregable, and, hence, everything is exempt.

Those are some of the problems that have occurred to me, and perhaps, Mr. Pitt or Mr. Marshall, you would like to comment briefly.

MR. PITT: Your Honor, first let me say that I apologize to the Court if we did not respond to the Court's inquiry.

I also apologize to the Court for any inconvenience in this concern created by the cross-fire of affidavits.

To speak of a Commission report at this juncture is somewhat of a misnomer.

THE COURT: I think we are past that. I think it has been established --

MR. PITT: I understand that. I don't mean whether it exists or not. I think what we are talking about at this juncture is the staff's completion of an investigation and its memorandum of findings and recommendation to the Commission.

I thought that the Commission's position, but I will assert now that the Commission's position is quite clear in this case, that the staff is still in the midst of its investigation. Even as to the staff report, it has not completed its activities. There is, thus, neither a Commission report nor a staff report at this juncture, nor even a New York Regional office report at this juncture at all. So those documents, whatever Mr. Marshall's request that I have been considering to be, are not in existence. They never have been in existence and at this juncture they are not in existence.

We are hopeful that they will be in existence but they are not at this juncture.

THE COURT: Let me be sure I understand that, Mr. Pitt.

Nothing has been submitted by the New York Regional office to Washington?

MR. PITT: To the Commission?

THE COURT: Well, first to Washington.

MR. PITT: To Washington, yes. There have been two or three minor portions of an overall report that have been given to me personally and Mr. Sporkin, the director of the Division of Enforcement. They are only portions of what the New York office is working on, and they are in a sense meaningless without the rest of the materials.

I do have, and I have received, those portions that were completed. Th ey are a negligible portion in terms of the substance of what New York is doing. But nothing has been submitted to the Commission for its consideration and the Commission has not passed upon, considered or deliberated with respectto any materials that have thus far existed only in draft form by the New York Regional office.

THE COURT: With respect to those two or three segments that have been submitted to you --

MR. PITT: Draft sigments, your Honor.

THE COURT: Is it your position that there is nothing in those segments that is factual and segregable?

MR. PITT: Your Honor, it's our position that there is nothing segregable based on the case law and based on the contents of the document in this respect.

What we have are materials that will enable at some point the Commission to make a decision whether it wants to issue a report of investigation, whether it wants to institute a civil enforcement action, whether it would like to recommend criminal enforcement action to the Attorney General, whether it will engage in rule-making or whether it will recommend legislation to the Congress.

At this juncture the interrelationship between whatever facts have been found, and they have not been verified as yet even by the New York people -- but the interrelationship between the facts and the recommendations is intricable and there are no reasonable segregable portions at this juncture. Indeed, there is nothing in final form even as to the New York Regional office.

While I referred to it at the last argument, I refer your Honor again to the Sears Roebuck case. Essentially it's a predecisional memorandum which will form the basis and focus of any Commission decision which may evolve out of this matter.

THE COURT: It is your position then that the provision of Section 552 that says that any segregable portion shall be submitted has no meaning?

MR. PITT: Not at all, your Honor.

THE COURT: With respect to either the criminal enforcement exemption or the intra-agency exemption?

MR. PITT: That is not my position. If I may, we recognize the obligation at an appropriate point in time to make available reasonable segregable portions or perhaps the entire report if there is such a document forthcoming.

What we are dealing with is the agency governmental process in its very incipient stages, and what we are suggesting, and what we think the case law supports us on rather firmly, is that at the time the Commission staff is in the process of compiling a report, conducting an investigation, completing that investigation and forwarding a recommendation, it is disruptive and there are no reasonable segregable portions within the intendment of the act.

I do think there is ample case law to support that, particularly the New England Medical Hospital case that we cited to your Honor from the First Circuit, and the Title Guaranty against NLRB case from this circuit, both of which --

THE COURT: Those are NLRB cases, and the NLRB is a special problem, Mr. Pitt. I am not sure that NLRB cases on any level apply.

MR. PITT: I would refer your Honor to the case of Grumman against Renegotiation Board which is a Supreme Court case which talks about the interlevel reports that were prepatory to the full Renegotiation Board making a final decision on whether to renegotiate certain government contracts.

The Court said nothing but the final agency document was entitled to disclosure.

I also respectfully --

THE COURT: Then it is your position that the courts have effectively nullified the provision of the act that provides for making segregable portions available.

MR. PITT: I would respectfully disagree with the term nullify, your Honor. I think the courts have given meaning and content to the Freedom of Information Act to make it workable, balancing the important purposes of public disclosure against the equally important purpose that an agency not be thwarted in the conduct of its investigations.

I think if the Freedom of Information Act is construed to mean that an agency investigation can be halted in mid stream and that damaging time be diverted away and publicity be attracted to what the agency is doing, then I think the authors of the Freedom of Information Act clearly misperceived what their exemptions were intended to provide.

I don't think the courts nor the Commission is asserting any nullification of the important principles of the Freedom of Information Act.

I think, your Honor, if I may, we are faced here with a very pragmatic situation. We have an agency that is conducting an investigation in good faith. It will be thwarted in that effort, and it can create irreparable and serious harm to that effort to construe the Freedome of Information Act as I believe no court has previously construed it.

THE COURT: Again, this is what I mean by in terrorem tactics. Why? How will making some part that is segregable of this draft report, or of these segments, available at this time thwart the SEC?

You have cited your dases to me, and I will refer you to the cases that say there is an obligation on the District Judge to inquire and not to take the representation of the agency, even of a highly respected agency such as the SEC, at face value. But you are asking me to do that.

MR. PITT: No, your Honor, I am not asking you to do that. I am asking you to accept two sworn affidavits on personal knowledge of the man in charge of the investigation to befin with, which is only a piece of our affirmative case.

We think once those affidavits came in they established, first, that there is a law enforcement investigation under way. There are legitimate law enforcement i-sues at stake, violations of the law or potential violations of the law are being inquired into.

Secondly, we established that the work of the New York office is, to use the words of Sears Roebuck case, predecisional. That is, that the New York office is compiling materials, evidence, conclusions, wrapping them together in a product for submission to me, to Mr. Sporkin in Washington, for ultimate submission to the Commission, upon which the Commission will determine what kind of law enforcements action, if any, it chooses to take.

If there is no law enforcement action that evolves out of this, then under the Freedom of Information Act once any possibility of law enforcement action ceases to exist, the materials are subject to disclosure under the Freedom of Information Act.

In addition, in response to your Honor's specific question, I am not arguing, and I hope I will not be misunderstood to be arguing, an in terrorem effect. I understand the broad position can be viewed that way.

What I am asserting however is that we are dealing at this juncture with an undifferentiated mass of documents. I think the affidavit Mr. Schatz gave your Honor are the parameters, conservatively estimated, what we are trying to pull together.

At this moment people are working feverishly and have been for 18 months, evenings and weekends, giving up vacations and the like, to complete an important report. Important to the Commission, not for political purposes, but because of the Commission's mandate.

At this juncture --

THE COURT: A lot of the mandate is in the public interest, ins't it? Isn't the public interest the protection of investors?

MR. PITT: The Supreme Court held that the words "public interest" are to be construed only in the context of the act, and our acts are investor protection acts. We are not a political agency. We are not here to help any political candidate for office.

Our concern is public investors. Our function is to find out what went wrong, if anything, with the system and what exists presently to either correct that or what must be done in the future to avoid similar occurrences again. That is our mission. Not to aid a candidate for election.

I feel the Commission is very strongly against its process being used for other than that major purpose.

THE COURT: I take it you are directing that to the fact that one of the plaintiffs here is a candidate for election.

MR. PITT: No, I go beyond that, if I may.

THE COURT: Let me just ask you this.

Doesn't the public have a right to what information can be made available if it is going to assist the public in making a decision with respect to the various candidates for election?

MR. PITT: Your Honor, in response to that question, if I may, I think it important to bear in mind that this investigation that we are talking about is not an investigation that was thrust upon the SEC. This is an investigation that the Commission undertook itself at great cost, at great expense, and with great hardship.

We wee sued by the City of New York, we were sued in the City of Philadelphia with arguments against the Tenth Amendment. We have vigorously defended our right to conduct this kind of investigation and vigorously asserted the right of the public and public investors to know when there is something that can be disclosed. So that this is not something that has been imposed upon us.

We are not recalcitrant in this regard. We have been here long before the plaintiffs in this case. I think our record speaks for itself in this matter.

But with respect to the public interest question that your Honor posed, it is not so much that one of the plaintiffs is a political candidate. It's the purpose and motivation for the lawsuit and the way it's been litigated. Even today we received word about press notification. As a matter of fact, I have to be quite frank with your Honor.

I misunderstood your law clerk's instructions with respect to what you may wish and the only reason that was clarified was because a news reporter who had been tipped off about this meeting had a better understanding of your Honor's order than I did. I can assure your Honor no one on the Commission's staff engendered that kind of publicity.

I recognize your Honor does not wish us to go too far in that regard but the whole matter is in a circuslike amoshphere that this case has been litigated. The documents do no more than reproduce newspaper articles and columns and make vague innuendoes that are troublesome.

I have never in my 10 years at the Commission been subjected to anything like this case before and I think your Honor has more to go on than the self-serving assertions of the SEC.

Your Honor has affidavits. Your Honor has the fact we instituted this litigation of our own free will. Your Honor has affidavits with respect to the breakneck pace at which our staff is working, a pace not only assuring the report is completed at the earliest possible moment, but is completed in a manner consistent with both the public interest and the interest of investor.

not some half-baked approach to a report but a thorough document to which the Commission has been celebrated over the last 43 years. It is that kind of document we want to produce, if and when it is ready to be produced.

That is the issue before this Court. The plaintiffs come in here and assert the public has the right to know.

My simple response to that is that at this juncture there is nothing that we can add to the public knowledge until our staff has had a meaningful opportunity to finish its own investigation.

THE COURT: Mr. Marshall, I will hear from you.

MR. MARSHALL: I thought we were starting to make progress during the Court's questioning if Mr. Pitt, because we started to elicit for the first time in this hearing, where before there was a denial of the existence of anything, just raw data, as a result of the Court's questioning which I was pleased to see we find now that certain things were delivered from New York to Washington.

We find now there were two or three portions. My information from Mr. Tulchin of the New York Times was that Chairman Williams and Mr. Rothman, a public information officer of the SEC, both acknowledged on July 15, 1977, that prior to that date nine portions of a report from New York were delivered, and on the 15th day of July the tenth portion, the tenth and final portion was on its way from New York.

So that already in this session this afternoon, the Court has elicited some verification that something, some sort of a report, was delivered.

Now, in response to the question Mr. Pitt said two or three portions were delivered to himself and to Mr. Sporkin. Later in reply to the Court's questioning, he said draft portions, but he didn't say it originally.

It seems to me what is needed here is some more specific questioning by the Court. Obviously, Mr. Pitt --

THE COURT: I think it was implict in what he said originally that it was draft, and that it was portions prepared by the New York office and so far as it being a Commission report, it certainly was not.

MR. MARSHALL: I didn't interpret it as such but I will bow to your Honor's interpretation.

The point I am trying to make remains that there has been added disclosure in this courtroom as to the existence of various transmittals of information from New York to Washington.

It seems to me this Court should go into that, that whatever was delivered from New York to Washington should be inspected by this Court.

Your Honor, I find it difficult to accept the statements made in this court, and I am not going to cast aspersions on anyone sitting at counsel table, members of the bar, but I must submit to the Court an article that appeared in the New York DAily News in which is described the group headings of the report that Mr. Pitt pretends not to know anytning about.

A letter says the chapter groupings, according to an SEC investigator, are the role of the bankers, the role of bond counsel, the role of city fathers, the role of the rating services and the role of investors.

It seems to me that someone is being more candid with a newspaper reporter than the SEC is being with the report.

I didn't fabricate this. This is public information.

MR. PITT: If I may, the only explanation for that may well be that I argued before this Court a week ago or so, and I was the one who indicated each of those portions. There has been no disclosure here. I think that presumably the reporter was present in this courtroom, but, again, this is just an example of litigating in the press, which is what is troublesome.

I have indicated to the Court the various types of sections in response to your Honor's question at the last oral argument and as I read the article hurriedly it appears to be a quote from what I had given to your Honor.

MR. MARSHALL: I don't know Mr. Millet's source, but he told me the source was not you. He wouldn't reveal his source to me, but the source was not you. He has spoken to the White House, he has spoken to sub-Cabinet officials, and he has spoken to people at the SEC and it is on that he based his article.

I don't like to try a lawsuit by articles in the newspaper but I don'thave access to what is going on. I have one tool to find out and that is the Freedom of Information Act and the Freedom of Information Act was written by Congress to devolve upon this Court the responsibility of seeing whatever is in writing and determining what is segregable and what isn't.

In the briefs Mr. Pitt argued that my argument was trying to have this Court assume the investigation, or assume supervision of the investigation. I don't think that anybody could pretend that that was the thrust of my argument, plain and simply, was the language of the Freedom of Information Act, that this Court have submitted to it whatever data the SEC has accumulated so that this

Court can decide, in the language of the act, de novo, by looking at whatever material there is in camera to protect everybody's interest, to determine whether any exemptions apply.

Both statements of Senators Harnett and Kennedy in the arguments before the Congress with respect to enacting the amendments to the exemptions No. 5 and No. 7 seem to indicate that they were broadening the right of the Court to look in camera and to grant this public dissemination of the information rather than narrowing.

THE COURT: I don't think there was any broadening of Section 5.

MR. MARSHALL: There was a St. John's Law Review article that came out within this month, and I got a memorandum of law I served on the other side I would like to submit to the Court, in which they discussed the decision of Judge Gagliardi entitled Title Guaranty against the NLRB, and the reversale of Judge Gagliardi by the Second Circuit, but the interpretation that that case, as your Honor observed incorrectly, applies only to NLRB cases because of their special restrictive disclosure rulings in connection with that litigation.

In that St. John's article I would like the Court to have for its assistance in interpreting the case indicated, to be released will interfere with the law enforcement proceeding, it is only relevant to make such determination in the context of the particular enforcement proceeding."

Also, there is a Congressional report with respect to these amendments that I would like to call the Court's attention to.

In 1965, the Senate report stated that Exemption Nol 7, and I have the page number in my brief, deals with investigatory files -- this is 1965, incidentally -- compiled for law enforcement purposes that could harm the government's case in court, and they use the word could.

I have here the citation. I am reading from Page 4.

On the other hand, in 1974, nine years later, when Exemption 7 was being amended, the 1974 conference report of the Senate stated that Amended Exemption 7 would permit an agency to withhold investigatory records compiled for law enforcement purposes only to the extent that the production of such records would, w-o-u-l-d, not could, but would interfere with the enforcement proceedings.

Senator Harnett remarked that the amended Exemption 7 explicitly place the burden of justifying non-disclosure on the government which would have to show that disclosure would interfere with enforcement proceedings, I didn't realize at the time, that the Congressional amendments broadening the liberality of interpretation by the Court, and narrowing the applicability of these exemptions, was as a result of the Ming case, EPA against Ming, the Supreme Court decision that did not approve in-camera investigation of a report of an atomic bomb explosion because that particular report was exempt by executive order which declared it to be top secret.

The SEC is relying on the Ming case. The Ming case is old hat. The effect of the Ming case has been nullified by the Congressional amendments. It was the Ming case that resulted in Congress enacting these amendments.

Senator Kennedy, one of the authoris of the 1974 amendments, I am reading from my brief, is quoted at 120 Congressional Record Page 17,019, "With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, the Freedom of Information Act proposes specifically to reaffirm the discretion of the courts through in-camera inspection to examine each and every element of requested files or records."

Further, Senator Harnett, the author of Amended Exemption 7, stated at 120 Congressional Record Page 17,033, in part, "In determining whether or not the information not as the SEC is arguing in some nebulous case that there may be enforcement proceedings in the future.

I would like to hand this memorandum of law up to the Court. It seems to me that the case law interpretation, some of which cases I cite, and the legislative history, especially the comments of Senators Kennedy and Harnett, who enacted the amendments, all indicate a very, very broad leaning of the Congress or mandate by the Congress for the disclosure of whatever facts there are.

Mr. Pitt is still taking the position today, as your Honor described, that the SEC is going to spoon feed certain conclusions to the Court, taking away from the Court the Court's ability to function as an in-camera investigator to make de novo decision as to what should or should not be released, as to what should be segregable and should be unintertwined, as the case law said.

I was very pleased to see the Court's initial questioning of Mr. Pitt, which when you broke it down as to what has been complete that we have to find out and what is not complete, what has been submitted from the New York office and what has not been submitted or whether it has been submitted in part and whathas not been submitted in part.

I would like to see that pursued, or, if necessary, to have a hearing where we can bring Mr. Williams, the chairman, to explain his letter to Senator Proxmire on May 4th when he said in part, "Although there is an inherent difficulty in attempting to provide a firm date for the completion of any investigation," and this was only written May 4th -- "particularly one as complex as this one, it is our intention to conclude our efforts by the end of this summer. We will, however, make every effort to complete our work earlier."

Well, it's now August 1st, and the end of the summer according to the dictionary I quoted to the Court is August 31st, and to hear Mr. Pitt argue it as if he doesn't know where to turn to turn anything over to the Court for the Court to exercise its function.

I think that is ridiculous and Mr. Pitt's own argument is belied by the letter the chairman of the SEC wrote to Senator Proxmire, to the interviews he has given Mr. Tulchin of the New York Times and the very statement of Mr. Rothman, their own press officer, has given to the New York Times.

I think it is the responsibility of this Court to have the SEC turn over to this Court whatever documents Mr. Moran's office in New York has accumulated, for this Court to pursue whatever documents everybody submitted to Washington, for this Court to determine whether it is really non-segregable opinions from one office to another as to what they should do reather than facts.

I think this Court has perceived its function under the Freedom of Information Act, and knows exactly what the Congress expects of the Court and I expect the Court will do exactly that.

THE COURT: Have you seen Mr. Schatz' affidavit, Mr. Marshall?

MR. MARSHALL: Yes, your Honor.

THE COURT: He says that the investigatory files consists of 100,000 documents and 92 volumes of transcript of testimony aggregating well in excess of 12,000 pages.

Are you seriously suggesting you expect me to make an in-camera inspection of all those documents?

MR. MARSHALL: No, I don't expect you to look at 100,000 documents, your Honor, but I am aware that the act says you can use the assistance of a special master, if necessary, number one.

Number Two, I know that this Court can ask Mr. Pitt, as I believe you suggested that Mr. Pitt do without the coercion of a court order when we last met, to summarize, to list the various documents, to summarize the substance, so that your Honor can get a better grasp and a better idea of what documents we are talking about.

I don't suggest you look at 100,000 documents. But that seems to me to have been an affidavit to dissuade your Honor from going any further, and I don't believe your Honor is going to accept that as a barrier for doing what Congress said should be done in this case.

THE COURT: Mr. Marshall, we started off this case with your asking for a complete report. It has been fairly well established now that there is no complete report, that there is at most a draft report which is not finished, plus underlying documents.

What at this stage are you requesting?

MR. MARSHALL: In the event that there is no complete report, I don't think that precludes us from being given the relief by this Court for the release of whatever facts at this stage are segregable and releasable.

But, further, the act provides that if the SEC, or if the government agency -- the act doesn't refer to the SEC -- that if the government agency demonstrates to this Court that it is making a good-faith, bona fide effort to obtain the information requested by the one requesting the information under the Freedom of Information Act that this Court has the power to retain jurisdiction and to order the government or the agency to complete whatever it has to complete by a certain date and bring it into Court complete.

I think this Court has the power to do that as well.

THE COURT: What is your authority for that? You said that the other day and I forgot to ask you the authority for that.

MR. MARSHALL: I am referring to Section 552 in title 5, U. S. Code annotated, Subdivision (a)(6), which says in part, "If the government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the Court may retain jurisdiction and allow the agency additional time to complete its review of the records."

THE COURT: That's a little more modest than the activity that you were suggesting the Court should indulge in.

MR. MARSHALL: The Court is also given authority, your Honor, under other provisions of Section 552 about expediting the case, expediting the hearings, granting such time as is necessary for the government to respond, and it seems to me that within the whole import of the Freedom of Information Act that there has been reposed in this Court the ability to do what is practice to achieve the results of the act.

If you can decide something de novo after in-camera examination of things that the SEC perhaps wouldn't like to see the light of day, if that kind of responsibility is given to the Court then it seems to me that your decision can provide anything you feel is fair and just and conforms with the act, balancing the interests of the SEC with respect to any predecisional or with respect to not disclosing how they arrived at decisions, but at the same time getting the facts out to the public with respect to the subject matter of this investigation that has been going on for 19 months.

It would seem to me, your Honor, with 100,000 pages of information, and with various draft reports already going, admittedly now, from New York to Washington, that it wouldn't be terribly difficult or onerous for Mr. Pitt, or Mr. Moran, or both of them, with the help of their staffs, to give a little more detailed information in order to enable this Court to make the kind of decision that Congress expects this Court to make.

I don't expect you to go over 100,000 documents but you can use the assistance of a special master, all sorts of resources available to this Court. Just because they have a big investigation that has taken 19 months, doesn't mean the hands of this Court should be tied.

THE COURT: Mr. Pitt?

MR. PITT: Without belaboring the point, briefly, the Freedome of Information Act only applies to an existing record. At best Mr. Marshall requested a completed report of somebody. It really matters not to the Commission's position whether it be a completed report of the Commission, of the Washington staff, of the New York staff, because there is no completed report from any of those staffs.

THE COURT: But, Mr. Pitt, somebody coming to a government agency and asking for documents may very likely mis-describe what he is asking for. The documents are in the control of the agency. The information as to the status of the investigation is in the control of the agency.

This particular agency when it started this investigation announced it was going to make no further information available until the investigation was completed

Mr. Marshall has asserted that he relied on matter which was published in the press. You fault him for that, but he had no other source.

He asked for a completed report because he thought a report was complete. Now it develops the report is not complete. But there is at least a genesis of the report which is partially complete but subject to analysis and editing, and there are underlying documents, and so he is saying that his request for the complete report should be interpreted.

Now, this information is available to him which was not before, as a request for the partially completed report and the underlying documents.

MR. PITT: If I may, your Honor, there are two distinct points. The first point that I did want to address myself to in the context of your comments is Mr. Marshall's assertion that this Court can now take jurisdiction to speed up the process of the Commission's report-writing efforts.

My only initial point on this subject is that if the document does not now exist this Court lacks any jurisdiction over the matter.

THE COURT: I wouldn't say it lacks any jurisdiction but I think it is pretty clear from the cases that a Court cannot tell an agency to manufacture a document that does not exist.

MR. PITT: That is precisely our position with the first part about his construction of the statute.

With respect to your Honor's point, however, I think the fact of the matter, again, is that there are portions of a report that aren't even written. All of those portions of the report may well be utilized with respect to a law enforcement action that the Commission may bring.

THE COURT: What law enforcement action?

MR. PITT: The Commission has as I indicated to your Honor several options available to it. One is a civil injunctive action.

As your Honor is aware from my comments at the last oral argument, there are various components and approvals involved in the sale and distribution of securities. Any one of those components can violate the federal securities laws in our view and they conceivably could be the subject of civil enforcement actions, administrative proceedings with respect to regulated entities, reference over to the Attorney General, or a report of investigation under Section 21(a) of the Securities and Exchange Act which vests in the Commission not only the discretion as to whether to investigate but full discretion as to whether to issue a report of investigation, and that is so held in the Woolley against U. S. case.

THE COURT: You are not arguing that such a report would be under Subdivision 7, are you?

MR. PITT: Your Honor, until the Commission has made its conclusion with respect to law enforcement action, I argue that it is both predecisional and subject to Exemption 5, and law enforcement subject to Exemption 7.

The relevant legislative history talks about a concrete possibility of law enforcement action, and I assert to this Court just as I did the last time and just as Mr. Moran's two affidavits assert that there is at present a concrete prospect of law enforcement acts.

Whether or not it will evolve depends upon the facts if our New York office an only complete its report and if Mr. Sporkin and I can review it and then if the Commission can read it. At this juncture we don't know the answer to that.

THE COURT: Since we are talking about securities which are themselves exempt under the act, isn't it more likely that the ultimate result would be a recommendation of legislation than a criminal enforcement action?

MR. PITT: The question of examption only goes under the federal securities laws as to whether those securities, municipal securities, are required to be registered.

The anti-fraud provisions of the federal securities laws are unabated in their application to municipal securities as well as to any other security.

THE COURT: I understand that. But Ipress my question.

MR. PITT: Your Honor, I think at this juncture it is premature to conclude that the Commission wouldn't consider law enforcement action against someone or somebody. At this juncture I simply don't have the answer to that question, and that is a good-faith response.

I don't think the Commission could tell your Honor if all five of the Commissioners or four of them -- I misspoke. If all four of them were here at this juncture because the Commission hasn't even received the completed product of its staff in New York and nothing could be more damaging to a potential action, nothing could be more damaging to that than to have the premature release of evidentialy materials that might be used in the law enforcement effort, to have incomplete or inaccurate information prejudice a case, or to have the Commission.

THE COURT: Now, this again is getting into the in terrorem approach which I really don't think moves us along at all. If those are possibilities they are possibilities in concrete situations, and you can urge them in concrete situation, but you can't urge them as a broad brush and say this is the SEC's position you take, because I won't take it.

MR. PITT: Your Honor, you again reiterate first that I am not arguing an in terrorem effect. I am arguing the pragmatic approach this circuit and the First Circuit and the Third Circuit have all articulated in respect of administrative agencies.

The fact the agencies have been the NLRB, I submit to your Honor, does not make a difference.

THE COURT: I submit it makes a big difference. I submit that the particular relationship between employer and employee in the context of the particular matters which have been considered under Freedom of Information differentiate the NLRB cases from all other cases, certainly from SEC cases.

MR. PITT: I will not belabor the point except to say the NLRB precedents have been used in Commission Freedom of Information Act cases and have been applied to us. I don't perceive the legal difference in the interpretation of the Freedom of Information Act.

In terms of the predecisional aspect, you have two Supreme Court cases involving two separate agencies, the Renegotiation Board and the National Labor Relations Board.

The Supreme Court came out the same exact way in both cases with respect to Exemptions 5 and 7. There is no inherent difference between what occurred in the Renegotiation Board case and what has occurred here.

I respectfully submit to the Court that there is no predicate for distinguishing the National Labor Relations Board on the basis of the Freedom of Information Act. It applies to all government agencies across the board in equal terms, and the Securities and Exchange Commission is the beneficiary of that decisional law and the decisional law of this circuit.

Beyond that, the point that we are making, your Honor, is not an in terrorem effect at all. It is the pragmatic concern of an agency trying to finish its investigation, to complete its work, and to make rational decisions without the pressures that the plaintiffs in this case are seeking to place upon it.

THE COURT: Mr. Pitt, the SEC has traditionally kept a large part of its records confidential, and there is provision in law for that, but the Freedom of Information Act it seems to me cuts across that and says despite your law enforcement desire, or whatever your desire is to keep documents confidential, you can only do it in certain prescribed situations, and you have to delineate those situations and you have the burden of showing me that with respect to the documents we are talking about, you have sustained that burden.

I just say you don't do it by saying we have a law enforcement purpose. I think maybe the ultimate solution here is for the Commission to submit to me for in-camera inspection the portions of the New York City report which have thus far been completed, and the reasons why it is claimed that those portions or the documents referred to in those portions are subject to exemption.

MR. PITT: I would like to as strenuously as I can urge against that course. At this juncture that would require the cessation of efforts --

THE COURT: That is nonsense, Mr. Pitt. That is really nonsense. We are talking about a document and we are talking about a document plus a Xerox machine.

MR. PITT: Your Honor, we are talking about diverting people to go through that report, to figure out what is in it, what might be used as the possible source of any kind of enforcement recommendation to the Court. That requires the people most knowledgeable about the report who are still in the process of the report.

I respectfully suggest to your Honor that based on the showing here, the two affidavits of Mr. Moran, the representations in Court, which have only been rebutted by hearsay, third-party speculation by Mr. Marshall, that we have sustained our burden in accordance with the case law.

In addition, your Honor, I think that the disruptive burden would be tremendous, and I urge the Court strenuously not to indulge in that type of endeavor at this juncture.

I think it is counterproductive to what the Commission is seeking to do here and what the plaintiffs' purpose ought to be seeking to do.

THE COURT: Let me ask you this, Mr. Pitt. You said earlier that the Commission itself has not yet considered Mr. Marshall's request.

MR. PITT: That's correct.

THE COURT: Is it reasonable to expect that when it does consider that reqeust, if it does consider that request, your position will be precisely the same as your position is now?

MR. PITT: Your Honor, I would have to assume that given the nature of the materials we are talking about the Commission would take that position, but I do point out to the Court -- and therefore, my assumption would be, without having consulted the Commission, that they would probably assert the same exemptions we talked about.

In connection with the Freedom of Information Act request made by two newspaper reporters from the Wall Street Journal and the Washington Post for evidentiary files in connection with the Commission's sensitive payments cases, the Commission did agree to make available to those reporters and to all persons who sought access to all of the materials in files as to which they felt that there was no longer a concrete enforcement prospect, even though the Commission had basis for withholding that information.

The Commission has, in other words, exercised its discretion in the past to make available information even when it has an exemption.

I cannot in good faith, because I simply have not inquired of the Commission, represent that that would occur here. My guess is that the Commission would assert the exemptions we have referred your Honor to in the course of this argument.

THE COURT: Do you have anything further, Mr. Pitt?

MR. PITT: No, your Honor.

MR. MARSHALL: Your Honor, I urge the Court to proceed on the in-camera basis, and I would like to make just this one comment which seems to me to be self-evident but I am going to risk saying it anyway.

If, for example, I was designated to be chairman of the SEC, and I come in and I know there is something happening about a report and I called Mr. Pitt, the general counsel to my office, and say, "Mr. Pitt, I understand there is a SEC report going on, and I want to know by tomorrow, within 24 hours, what has New York done, what has been sent down here, where do we stand, what facts do we have, at least give me a summary," I would have it in 24 hours. And I wouldn't be told that I am disrupting the agency.

As the Commissioner I would be told exactly what the Commission is doing, and I just don't buy it, it is hokum that we are disrupting a report for them to show this Court what was delivered from New York to Washington.

I urge that this Court proceed on that basis. Your Honor, there hasn't been a single meeting of the burden imposed upon the government by the act. They are supposed to show with particularity. They are supposed to show a specific law enforcement proceeding.

Your Honor asked what law enforcement proceeding. He talks in generalities. You have characterized his argument. There is no substance to it. It's just borad, conclusory statements designed to keep the public unaware.

THE COURT: No, the law enforcement exemption applies even when there is a prospect of a law enforcement proceeding.

MR. MARSHALL: They haven't shown the Court of any prospect in camera. Who violated? What tribunal are they going to bring this proceeding in?

I asked that in my brief. There isn't anything you and I can point to as to a reason to apply either Exemption 5 or 7 other than a conclusory statement.

Incidentally, your Honor, in their public -- I haven't seen what they gave you in camera with respect to that order, but I did get my hands on the SEC public -- which I submitted as part of my papers, the public press rlease of June 8, 1976, and there is not a word in this press release that Senator Proxmire's office sent out with respect to law enforcement purposes.

It reads whether to see remedial relief which to me is legislatire amendments.

THE COURT: I did want to ask you waht you meant by those words, remedial relief, which is the language which is used in the release. Doesn't that mean legislation?.

MR. PITT: No, your Honor, we have always taken the position that injunctirve actions, coupled with ancillary relief or administrative proceedings, are remedial relief of the Securities and Exchange Commission.

Indeed, I think if you take a look at the third paragraph of the order, it defines it in those terms. It says the Commission is authorized to conduct investigations to seek remedial relief where violations of the Securities Act and/or the Exchange Act have occurred.

I don't think there was any attempt at equivocation there, your Honor. It clearly indicatedthat one possibility was a law enforcement action either in a Court, in an administrative proceeding, or by reference to the Attorney General of the United States.

I think that release is quite clear on that point.

THE COURT: Gentlemen, I had considered dismissing the compalint on the grounds that proper channels were not gone through within the SEC. It seems to me today that simply would postpone this action for two months or so, and I can't see that any interest is served by doing that.

I had also considered referring it back to the SEC so the normal appellate process of the SEC could be gone thorugh, but I take it that that wouldn't only be time consuming but it would probabely eventuate in our being back here again.

Under the circumstances, I think what I should do is, first, to ask you, Mr. Pitt, specifically what is available in Washington and in New York with respect to the New York report, and, two, to submit what is available to me in camera tomorrow.

MR. PITT: Tomorrow, your Honor?

THE COURT: Yes.

MR. PITT: Your Honor, the only thing I would ask is that in order to give us a chance between now and tomorrow to consider that if you can embody your direction in an order in case the Commmission has some inclination to seek some kind of review of the matter. I am not suggesting that it will, but we understand that your order is returnable tomorrow but just for the sale of preserving the Commission's options I would appreciate if you could do so.

THE COURT: All right.

Is there anything further, gentlemen?

Thank you.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X
JOEL HARNETT, et al,

Plaintiffs,

-against-

SECURITIES AND EXCHANGE COMMISSION,
et ano,

Defendants.

- X

77 Civ 3110 VLB

SUPPLEMENTAL MEMORANDUM ON BEHALF OF THE PLAINTIFFS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- X

JOEL HARNETT, SAVE OUR CITY, INC.
and GORDON MARSHALL,

Plaintiffs,

77 Civ 3110 VLB

-against-

SECURITIES AND EXCHANGE COMMISSION
and EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

Defendants.

- X

SUPPLEMENTAL MEMORANDUM ON BEHALF OF THE PLAINTIFFS

A St. John's Law Review article, in Volume 51, Winter 1977, Number 2, has fortuitously just been published in which commencing at page 251 is a discussion of the narrowing of the application of exemptions under the FOIA and the trend towards a case by case determination utilizing in camera examination by the court in arriving at a decision as to disclodure or non-disclosure with specific reference to the actual harm which would or would not result.

> in camera inspection to examine each and every element of requested files or records."

Senator Hart, the author of amended Exemption 7, stated specificially in reference to Exemption 7(a) that

> "In determining whether or not the information to be released will interfere with a law enforcement proceeding it is only relevant to make such determination in the context of the particular enforcement proceeding." (120 Cong. Rec. 17,033)

The St. John's Law Review article cites in support of case by case determination the statutory language itself:

> (a) The requirement that the agency prove the applicability of a specific exemption (5 USC Section 552(4)(B), and
>
> (b) The provisions for de novo review (5 USC Section 552(4)(B), and
>
> (c) Severability of records (5 USC Section 552(b) and the authorization of in camera inspection by the court (5 USC Section 552(4)(b).

The St. John's article further states that the Congressional debate was prompted by an amendment clarifying the District Court's discretional power to order in camera inspection on disputed material. (120 Cong. Rec. 17,018-31)

The Law Review article also points out that the amendments to the FOIA written by Senators Hart and Kennedy were a direct result and constituted Congressional reaction from the decision of the Supreme Court in EPA v. Mink, 410 U.S. 73 (1973) which case is so heavily relied upon by the SEC in this action.

The SEC seems to ignore the narrow holding of the Mink case and the fact that the liberalizing amendments further restricting the applicability of any exemption were a direct result of the Mink case holding.

Much of the debate over the 1974 amendments in Congress was permeated with expressions of support for a case by case approach.

Senator Kennedy, one of the authors of the 1974 amendments, is quoted at 120 Cong. Rec. 17,019 (1974) as follows:

> "With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, (the FOIA) proposes specifically to reaffirm the discretion of the courts through

The remarks of Senator Kennedy at 120 Cong. Rec. 17,019 makes it clear that the in camera provision was mean to apply to all exemptions.

Furthermore, the debate over Exemption 7(a) re-emphasized the burden of the agency to justify non-disclosure (see the remarks of Senator Hart, 120 Cong. Rec. 17,033).

The burden was interpreted as requiring a showing that disclosure actually *would* harm, rather than *could* harm, an enforcement proceeding, thereby eliminating mere probability of harm as an acceptable quantum of proof.

The 1965 Senate Report stated that

> "Exemption No. 7 deals with investigatory files compiled for law enforcement purposes ... *could* harm the Government's case in Court." (Senate Report No. 813, 89th Cong. 1st Sess. 9 (1965)). (Emphasis added)

On the other hand, the 1974 Conference Report stated that amended Exemption 7 "would permit an agency to withhold investigatory records compiled for law enforcement purposes only to the extent that the production of such records would interfere with the enforcement proceedings." (Senate Rep. No. 1200, 93d Cong. 2d Sess. 12 (1974) (Emphasis added)

Senator Hart remarked that the amended Exemption 8 "explicitly places the burden of justifying non-disclosure on the Government, which would have to show that disclosure would interfere with enforcement proceedings." (120 Cong. Rec. 17,033 (1974)) (Emphasis added)

The Congressional philosophy which emerges is one of general disclosure,with non-disclosure authorized only when specifically affirmatively justifed "in the context of a particular enforcement proceeding" (See remarks of Senator Hart, 120 Cong. Rec. 17,033).

Rebutting the SEC's argument in favor of automatic application of Exemption 7(a) certain cases refer to the requirement of a showing of harm in each case as eliminating the possibility of automatic application of such exemption.

See:

McDonnell Doulgas Corp. v. NLRB, 92 L.R.R.M. 2072, 2073-74 (C.D.Cal. 1976

Deering Millikin, Inc. v. Nash, 90 L.R.R.M. 3138,3144 (D.S.C. 1975) rev'd in part and aff'd in part sub nom

Deering Milliken, Inc. v. Irving, 94 L.R.R.M. 2538 (4th Cir. Jan. 25,1977)

Dated, New York, New York
August 1, 1977

Respectfully Submitted

GORDON MARSHALL
Attorney for Plaintiffs

United States District Court
Southern District of New York

Joel Harnett, et al.
Plaintiffs
v
Securities and Exchange
Commission et ano,
Defendants

77 Civ. 3110 (VLB)

Pursuant to direction given at hearing this date, and in accordance with the provisions of 5 U.S.C. § 552(a)(4)(B),

It is ordered that the Securities and Exchange Commission submit to me, for in camera inspection, those portions of the report to the Commission by the New York Regional Office of the Commission concerning transactions in the securities of the City of New York and related matters which have been drafted and submitted to the Administrator or the Associate Administrator of the New York Regional Office, by 5:00 p.m. August 2, 1977.

New York, N.Y.
August 1, 1977

U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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JOEL HARNETT, SAVE OUR CITY, INC.,
and GORDON MARSHALL,

Plaintiffs,

- against - 77 Civ. 3110

SECURITIES AND EXCHANGE COMMISSION,
EXECUTIVE OFFICE OF THE PRESIDENT
OF THE UNITED STATES,

Defendants.

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New York, New York
August 2, 1977, 2:00 p.m.

Before:

HONORABLE VINCENT L. BRODERICK,

District Judge.

Appearances:

GORDON MARSHALL, ESQ.
Attorney for Plaintiffs

HARVEY L. PITT, ESQ.
MARVIN JACOB, ESQ.
STANLEY SPORKIN, ESQ.
JOHN SWEENEY, ESQ.
Attorneyfs for Defendant Securities and
Exchange Commission

Appearances (Cont'd):

ROBERT B. FISKE, ESQ.
United States Attorney for the
Southern District of New York
Attorney for Defendant Executive Office
of the President of the United States

BY: MICHAEL DOLINGER, ESQ.
Assistant United States Attorney.

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MR. PITT: Your Honor, I realize over the la
two weeks we have taken up much of the Court's time. We are grateful for this additional hearing on such short notice.

Yesterday, after the Court entered its order, we met in chambers with your Honor and counsel for Mr. Harnett and I advised the Court that I would apprise the Commission of the Court's order and ascertain their reaction to it.

I have done so and I undertook to advise the Court and Mr. Marshall of the Commission's reaction to the order, and that is the reason why we are here today at this hearing.

MR. MARSHALL: I don't want to interrupt, but I have not been advised of the Commission's reaction. We specifically asked you the purpose of the hearing. You

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said I would find out at 2:00 o'clock.

THE COURT: Mr. Marshall, neither have I.

MR. MARSHALL: Okay.

THE COURT: We are both being advised at the same time.

MR. PITT: Upon being advised of the Court's order, the Commission expressed serious concerns with respect to the matter. The members of the Commission as that I reconfirm to the Court that they have never receiv a Freedom of Information Act request, nor have they been asked to pass upon one.

As I have indicated to the Court, this action represents an unwarranted attempt to circumvent the procedures delineated in the Commission's rules as well as in the Freedom of Information Act itself concerning the manner and method by which requests for information are made.

The Commission indicated that until Mr. Harne made his Freedom of Information Act request in accordance with its rules, the Commission is not in a position to determine what its reaction would be to such a request.

As I advised the Court yesterday, the Commissi has, where in its discretion it thinks it appropriate, made available information even when exemptions apply.

It has also insisted upon compliance with exemptions where it has deemed that appropriate.

But the Commission does feel strongly that this Court should not undertake to determine in the first instance what the statute so clearly vests in the Commission. This has not yet occurred.

The Commission also indicated that even if a Freedom of Information Act request had been deemed to have been made, the only document requested, be it a Commission report, a Washington staff or a New York Regional office report, does not exist.

The Commission also indicated its serious concern, and this is one of the reasons why we asked the Court for this hearing, with the precedential effect of this Court's order.

So far as we can tell, we believe this is the first case in which an agency in the mist of a law enforcement investigative proceeding has been ordered to produce in camera multiple drafts that plainly reflect attorney's work product and the predicates for the correction of a pre-decisional memorandum upon which the Commission can determine what, if any, law enforcement action should be taken in this matter.

The Commission has directed me and its counsel to emphasize that its concern is not limited to the specific multiple drafts this Court has requested be produced in camera. Rather, the Commission's concern is with the implication of this Court's order for its future law enforcement efforts. It perceives a substantial risk if future investigations will be subject to delay and litigation under the Freedom of Information Act, not just by a third party, as in this case, but by a proposed respondent or defendant in the Commission law enforcement action.

As the Court is aware, the Freedom of Information Act refers to a request by any person, and there is no basis to differentiate between categories of persons making such requests.

Thus, from the Commission's vantage point, your Honor's order cuts across all enforcement actions now pending and those that the Commission may undertake in the future.

Given tht position, the Commission has asked me to urge upon this Court that it reconsider its order entered yesterday afternoon. Stanley Sporkin, the director of the Commission's Division of Enforcement, is in Court with me at counsel table and is intimately familiar with the Commission's investigative procedures generally and in this case specifically. If the Court please, Mr. Sporkin can elaborate on the position and on the effect on our investigative effort in connection with our request for reconsideration.

THE COURT: I will be glad to hear Mr. Sporkin.

MR. SPORKIN: Thank you, your Honor.

I am very pleased to be here and --

THE COURT: Good to have you here, Mr. Sporkin.

MR. SPORKIN: I think what is really of concern is the particular mischief that can be played on an important agency that has law enforcement responsibilities if it means that during the course of a highly active investigation that somehow we can dislodge that from the workings of the Commission and bring it into court and then have the Court go over the entire record at that time.

You can just picture, I'm sure, what would happen, let's say after two weeks of investigation, then after three weeks, then after four weeks.

As Mr. Pitt pointed out, there has been no other instance where a Court has injected itself in this way, and what really concerns us is the horrendous precedential value that this type of thing could have. Just envisage, for example, in a grand jury proceeding, if a Court would inject itself in the midst of that proceeding to go over the work product of what the U. S. Attorney has developed

THE COURT: I don't think that comes within the Freedom of Information Act.

MR. SPORKIN: I appreciate that. But I am just using the grand jury as analogous to types of proceedings that I am sure you are aware that we conduct.

I want to point out that I have been personally dispatched here to work with Mr. Moran. I have been here now for two days. I brought with me over half a dozen of my own people to maneuver this case, to get it to a point where we can get to the Commission. And I just honestly feel that it just does such mischief to come in at this stage, before we can produce something, before the Commission itself can consider this matter, before we can look at these rought drafts, raw investigative records here, and I just urge upon this Court that I just don't think that's what this Court wants to do at this stage.

Surely the Court, if it wants to at any point, to check us out on the representations that I am personally making to this Court, certainly can do so in a week or 10 days from now, to see what progress has been made.

I would just urge you not to try to inject itself at this point of the case.

Thank you, your Honor.

THE COURT: Wait, Mr. Sporkin. How is the Court injecting itself in any way? The statute gives the Court the authority, and I think the obligation to inquire. As the statute is drafted, it seems to me that it says, and certainly the interpretations have indicated that, the Court is not to rely on representations; it is to satisfy itself that a dcouemtn is what it is said to be.

This is not impugning the integrity of the SEC or any other agency. It is perfectly natural that someone involved in an agency, and I know that from my own experience, having been involved in one or another agency, has a different point of view than the Court does, and the whole thrust of the Freedom of Information Act, as I read it, is that the Court is to satisfy itself in whatever way it can, and specifically include in-camera inspection, that something is what it is claimed to be.

MR. SPORKIN: But, your Honor --

THE COURT: How is that injecting the Court in any onerous way?

MR. SPORKIN: May I answer that?

THE COURT: I can understand the position that the SEC has taken that this lawsuit itself has put a burden on the SEC, as every lawsuit does. But I don't understand how inspection, which is authorized by the statute, is going to have the horrendous effect that you suggest.

MR. SPORKIN: As I read the statute, the statute states it may. It doesn't say it shall. And what is concerning me, your Honor, if the position is taken that every time an FOI request has been filed that the Court shall inject itself, is that I think that would be wrong.

Now, when the Congress used the word "may," therefore I think it specifically was envisioned that the Court could use alternative means of making that judgment, and it seems to me that where you have a case that is in being, and there is no dispute that there is a case here that is in being, where you have affidavits that are uncontested -- and I can assure you, your Honor, I would not be in New York City, working on a report if I had it in Washington, I would not be bringing my people up here. Everything is to the contrary, and it seems to me that that ought to be satisfactory. If there is an additional satisfaction, fine.

But what concerns me is that if we now construe that word to be "shall," the very things that I have mentioned will come to pass.

We have an investigation that is three weeks old. We come into court. The Court says,"Let me see what you've done so far."

I don't think that the Court wants to take over a supervisory role with respect to the investigative work of the various agencies of the United States. I think that a great mistake is made when we cannot have the agencies function.

As I read the purpose of the Freedom of Information Act, what really is the mischief here that is being complained of? What is it? Everything is in this record, and it is uncontroverted. As I understand it, there has not been an affidavit or anything that would indicate other than what we have stated. There is no report, final report.

I don't think that this Court would want to get in and substitute its judgment for the members of the Commission. It seems to me that you would want the Commission to review this record, and what has happened here is we've shortcircuited all this. And I really think that for law enforcement purposes, for proper administration of the FOI Act, that I don't think the Court wants to go and take this large or giant, step at this point. There is no need to do it. There has been no showing, your Honor.

THE COURT: All right. I will hear from Mr. Marshall. Thank you, Mr. Sporkin.

MR. MARSHALL: Your Honor, I think that we are witnessing an attempt by the SEC -- I mentioned that I was fearful of this happening, in one of my briefs that I submitted to the Court -- to just stonewall its way, without making the Court privy, as Congress envisioned, to what it is that they are seeking to attach an exemption to.

Here we are at the third hearing in Court and still they have no disclosed a single document, they have not met the burden one iota which the Congress imposed in the FOIA in order to show the Court what words, what pages the exemption should attach to.

What they are really arguing now, as I understand Mr. Sporkin, is something perhaps they should do to some Congressional committee to seek an amendment to the Freedon of Information Act.

THE COURT: Wait a minute.

MR. MARSHALL: That's what the argument sounds like.

THE COURT: No, it isn't, Mr. Marshall. They are saying, and it is something which I said to you, I think, on some previous occasion, that the act should be taken completely, and one of the provisions of the act is that a proper request should be made and that a proper appeal should be taken. And they are saying that there was no proper appeal taken here, that the Commission itself qua Commission has had no chance to give consideration to your application.

And they are saying that the Court shouldn't exercise even an in-camera review until those proceedings have been had.

MR. MARSHALL; I thought that we had overcome that, at least as far as yesterday, with the Court granting the order. I was not notified that there was going to be a hearing for reargument or something like that. I thought that that order had been signed and I have been served with no argument.

THE COURT: You know that order was signed. You were sitting there when I signed it.

MR. MARSHALL: Of course. I am aware of having been --

THE COURT: As was Mr. Pitt.

MR. HARSHALL: Of course. I am aware of having been in Mr. Moran's office last May in the presence of others when he stated the report -- this is last May -- was almost completed, that nine out of ten sections have already been completed.

I am aware of statements made to Mr. Tulchin that the report has been completed, acknowledged to him by Mr. Andy Rothman of the SEC and by the chairman, Mr. Williams.

I am aware that the New York State Committee on Banking has made a Freedom of Information Act request, the New York State Committee on Banking, which furnished the SEC with a lot of information in the course of the SEC's investigation, and they have made a demand on the Freedom of Information Act and the demand has been denied, and now they have made a demand and an appeal.

So that when Mr. Pitt says that the committee hasn't discussed what position it would take on such a request, the Commission has already acted in denying a banking committee of the New York State Assembly access to this material. They haven't determined the appeal. This appeal was dated July 23th.

My point is, your Honor, that during the course of this argument we have progressed from a stage where there was only a hundred thousand pages uncollated, unsorted, raw data, to a further acknowledgement, in the second oral argument in the court, that at least three sections, whether in draft or otherwise, have been sent down to Washington.

We have -- I dind't know until after argument yesterday -- the circumstances of Chairman Williams' letters to Senator Proxmire. Apparently Chairman Williams was before the Senate on confirmation of his position as jgrp

chairman of the SEC, and Senator Proxmire asked him when will this report on New York be completed. He said he didn't know, he would go back and find out and write a letter to the chairman.

So that this letter that was submitted in evidence dated May 4, 1977, by Chairman Williams to Senator Proxmire was as a result of the chairman going back to the SEC. I don't know whether he spoke to Mr. Pitt or who, I presume so, or Mr. Sporkin, and they advised him, or prepared a letter for his signature, to tell Senator Proxmire the report would be finished at the end of the summer or sooner.

That was a considered letter, not to be taken lightly, in writing to a chairman of a Senate committee, after investigation as to the status of the report. It seems to me the closer we come to August 30th, the end of the summer, the more remote the report is. It is almost like an Alice in Wonderland type of a story, that the closer you come to the date, more and more it diminshes, until they come to the Court on the first oral argument and say, "What report?" You have heard that as I did. What report?

It seems to me that Congress has reposed in your Honor the ability and the obligation, if I may say, to look at what they have. For them to stand here and say, your Honor, "Take our word for it, there is nothing for you to see," I dont think that's what Congress intended in the Freedom of Information Act.

I don't think that Congress intended for the agency to decide what should or should not be released. The intent of Congress was to make facts available to the public. This is a very critical time for the people of the City of New York, as your Honor correctly stated yesterday in summarizing the various alternatives you considered exercising and not exercising which resulted in your signing the order, and I believe your Honor to be correct in that.

And I think that the argument that this case is going to be precedent for a grand jury is a red herring argument, because the Freedom of Information Act and the drafters, Senators Kennedy and Harnett, said, and case law says, especiall the discussion of the NLRB cases, that the Freedom of Information Act request and hearings in the Court should be considered on a case-by-case basis.

And if it should be decided in an NLRB case that there should not be an in-camera inspection or there should not be a release of certain statements by witnesses or what-have-you, that only applies to that case and does not apply to something else.

And the safeguard that Congress wrote into the law and the case law interpretation of the case-by-case examination requiring the federal district judge in each case to examine that case de novo I think demolishes their argument of this precedent.

It seems to me that they are desperate not to let this Court see one page, one word, one syllable, and it seems to me that they have been playing a semantic shell game with us and with the Court in giving an affidavit by Mr. Moran, for example, that no completed report has been sent to Washington, as if that would stifle any further inquiry.

But when you ask, if not a complete report, any report, we finally elicited in this proceeding, "Well, three sections went down."

When we were told in the first argument by Mr. Pitt that there is just a hundred thousand pages of raw, uncollated data, we now find that with respect to one section of a report there is 167 pages written out of 400. I don't remember the section, I didn't take notes during our session in chambers yesterday.

So it seems to me the more we question, the closer we come, that the SEC is now reluctantly making a disclosure that there is a report but they don't want the

Court to see it.

And that's what we come down to. And this is a game. As to whether it is completed, I am sure that 10 years from now someone can think of another comma or another phrase to put in the report to lable that which existed previously as incomplete.

I think that the people of the City of New York are entitled to this Court, to your Honor exercising the authority given by Congress to an in-camera inspection as to what they have. I don't know what they have. But I'm content for this Court to see what they have. And after you see what they have, I'm content for them to have to meet their burden with respect to every specific thing that they want withheld.

I'm content with this Court exercising that function, and I seriously urge this Court to adhere to the order that was signed, and hopefully the SEC will deliver whatever it is they seem to indicate that they would deliver yesterday, unless they are going to take an appeal. And if they are going to take an appeal, I'm content to fight that appeal. But if they are going to take an appeal, I would appreciare it being expedited so that we can have a hearing immediately up above.

THE COURT: Just one second, Mr. Pitt.

I would just reject out of hand at least some part of your argument, Mr. Marshall. I don't think there is any shell game being played here at all. I think the position that the SEC is taking is a very responsible position of a law enforcement agency -- among other things it is a law enforcement agency -- which has certain responsibilities of investigation. And I think that the extent to which there is Court oversight or Court review does interfere with the ability of the SEC to perform its law enforcement functions with dispatch.

I also think that Congress anticipated that this was the case when it passed the Freedom of Information Act and I think it passed it knowing that life hereafter was going to be less easy for people working in our various federal agency.

I'll hear from Mr. Pitt.

MR. PITT: Your Honor, I won't belabor this much further on our request for reconsideration. And I appreciate, on behalf of the Commission, the comments about the shell game.

I think what is important to bear in mind, and this is not a technical argument but one directed to the pragmatics of dealing with the Freedom of Information Act requests, is that both the Commission and its counsel in dealing with this litigation and the Court have had a great deal of difficulty as we've shifted from document to document that has become the subject of the request.

In part it is because I think the plaintiffs did not know what they were requesting, if they were requesting anything, and certainly because throughout this proceeding there have been various and conflicting representations about what has been requested.

There have been requests for reports, and we have dealt with those; there have been requests for underlying documents; the plaintiffs' papers all talk about all of the investigatory files. We did not say there were a hundred thousand pages.

THE COURT: Mr. Pitt, this really isn't quite fair, I don't think, because obviously, when somebody approaches an agency asking for materials in a particular area, they are much less well informed on what the documents are that they are seeking or what stage they are in than the agency itself is. And I think to require precision in requests just doesn't make much sense, because you are not going to be able to get it. And I think, as you well know, some of the cases have dealt with this problem.

MR. PITT: I may not have articulated clearly, but that is precisely my point, your Honor. I am not suggesting that we must be directed to a specific piece of paper within our files. We have never construed the Freedom of Information Act that way. I think if your Honor looks at the record of this Commission, you will find that our responses under the Freedom of Information Act are far superior to most agencies and we have taken the act quite seriously.

What my point was directed at is that throughout the course of this litigation, we have been put to the burden of responding as the request for a document shifted. I am now chiding the plaintiffs for their lack os precision, but what I am talking about is that the administrative process that was designed to ferret out these problems was never invoked, nor was it ever allowed to play through to its full completion.

Indeed, even at this juncture, the record before this Court, which I do believe is uncontested, is that the Commission has never considered a Freedom of Information Act request, the Commission has not had the opportunity to sort through what Mr. Marshall's request was, and that with respect to specific documents, the documents that have been isolated do not exist. The affidavits and comments that Mr. Marshall refers to are not direct information. Statements that have been attributed to the chairman have been explained in affidavits and in letters. A letter to an oversight chairman of a committee indicating that would expedite our report is consistent with a responsible agency's functions. Indeed, that is why Mr. Sporkin is here in this city, and has been since the beginning of the week, because of our deep concern of trying to do our function as best we can.

But that does not warrant the circumvention of an administrative process that would have avoided these difficulties, and the problem that we perceive, your Honor, if I may, is that there has been no predicate for in-camera inspection, and that to me is the threshold question.

We have maintained all along that the jurisdictional requirements of the Freedom of Information Act have never been perfected, that before this Court ever gets to the question of in-camera inspection there are far more fundamental questions that must be resolved, namely whether a Freedom of Information Act request was made, which we asserted has not been, and whether it has been acted upon, and was the agency in this case, even if it be assumed that a request was made, acting irresponsibly?

And this Court has before it, in addition to the jurisdictional predicate and the exhaustion predicate, the sworn affidavits of its staff officials, sworn to under oath, that the reports do not exist, we are dealing with pre-decisional documents.

Today in this Court three senior officials of the Commission sit at counsel table to respond to your Honor's request. If your Honor adopts the position that Mr. Marshall's suggestion of not only in-camera inspection but then requiring that the SEC and its officials explain in detail each word, each sentence, each phrase and paragraph of its report with respect to carving out materials that could be disclosed, the people who are responsible for work on the investigation are diverting their attention. In addition, the very functioning of an investigatory process comes to a conclusion.

Earlier in this argument an analogy was made to the grand jury and your Honor correctly pointed out that grand jury proceedings are not subject to the Freedom of Information Act. But the Department of Justice is, and the Department of Justice may be subject to requests for its attorneys' work product in connection with grand jury presentations.

No Court, so far as we are aware, has asked for in-camera inspection of those materials at a time when the investigative process is in operation.

All I can assert to your Honor is you have good faith sworn affidavit from this agency, you have no conflicting evidence in the record, you have a serious jurisdictional impediment to the assertion of jurisdiction, and what we are asking is that the Commission, which commenced this investigation, which undertook it on its own because of its concept of its public responsibility, be permitted to complete its efforts, and at this juncture, if there is a request for information, which may be mooted by the fact that the Commission will probably release a report that Mr. Sporkin will be finishing, at that juncture, it is appropriate to ask the agency to justify its processes.

But what we ask this Court to do, and strenuously urge, to avoid the kind of appeal or confrontation that Mr. Marshall is referring to, is to give us the opportunity to complete our efforts, to accept our representations that have been sworn to, and let this agency complete its self-appointed task consistent with the public interest for the protection of investors.

THE COURT: Mr. Pitt, what Mr. Marshall had to say and what is in the order that was issued last night are two different things. The order providing for in-camera submission, and there is nothing in the order with respect to the dotting of lines and crossing of T's. And so that is not before me now.

And I don't see, despite the fire that was in the very papers that was submitted, that it is a question of the good faith of the Commission involved here. What I do see is that the law provides for a review by something outside the Commission when a controversy such as this arises.

The question, for example, which I've brought up several times in previous hearings with you, of the Senate Freedom of Information Act which provides for making available segregable portions of otherwise unavailable materials, is something which it seems to me the Legislature has, the Congress has envisioned a judge will do.

MR. PITT: Your Honor, if I may --

THE COURT: Let me just give you one other thing to shoot back at.

The argument Mr. Sporkin made with respect to law enforcement, which was consistent with the argument you made yesterday, seems to me is at some odds with a report which is going to be immediately issued to the public.

Now, this is probably a bridge that hasn't been crossed within the Commission yet. But it does seem to me that there too an in-camera inspection is going to at least be helpful to me in making a resolution here, and I don't think that there is involved here any questioning of the good faith of the SEC in providing for a Court review.

MR. PTTI: If I may, your Honor, it seems to me that an orderly construction of the Freedome of Information Act is that first there must be jurisdiction and then the processes under the act would apply. And it seems to me that before an in-camera inspection can be ordered, or should be ordered, the Court presumably should be ruling upon its jurisdiction. We have indicated that there is none in this case.

With respect to the contents of the documents, we agreed, and I think I have expressed this to the Court, that the provisions regarding in-camera inspection are certain permissive. And this Court has the right and the capacity, if the jurisdiction exists, to require an in-camera inspection, as its order entered yesterday does.

The difficulty with that position is that where there is an on-going investigation for law enforcement purposes, and that is an essential fact that has not been contested, where there is an on-going law enforcement investigation, the Court should, we submit, as an exercise of its discretion and permissive powers, and consistent with the case law, utilize other means than in-camera inspection, because at this juncture, if I may, if we were to produce before your Honor right now in-camera the pages of draft materials, your Honor, I suspect, would still need some staff assistance from us to go through the materials and explain why certain provisions are what they are and what the possible arguments against disclosure are.

For example, as we indicated in the Safeway case that we cited in our memorandum and in the Renegotiation Board case, even a document which contains already public facts has been held to be subject to exemption --

THE COURT: It is a selective process. Because of the very fact that it is included in the report or in the draft indicates that it is a selective process.

MR. PITT: Precisely.

THE COURT: I understand that. I understand that.

MR. PITT: It seems to me that without that kind of staff assistance, without that review with your Honor, as the act has contemplated, assuming jurisdiction, there will be a tremendous involvement in expenditure of time.

We are talking about drafts that have been prepared by attorneys as work product for their client, the Securities and Exchange Commission. Insofar as I'm aware, in the mist of an on-going investigation, where there have been presented to the Court sufficiently satisfactory means of establishing the fact that there is an investigation going on, tht it is for law enforcement purposes, and where the specific documents that would be requested in camera are pre-decisional in nature, which is uncontested in this case, it seems to me no court has come forward and said you must produce those in camera.

It is not just this case. I stress that to your Honor. It is not our desire to hide any sheet of paper from this Court. Despite the fact that we have unedited materials which have all of the musings and ramblings of lawyers that I am sure your Honor is familiar with, we are not ashamed of the work product of our lawyers as such.

What we are concerned about are the processes of decision making within the agency, the disruption to all investigations, not just this investigation but all future investigations and all pending ones, and not just requests from third parties, such as Mr. Marshall or Mr. Harnett, but from proposed respondents and defendants who realize that they are the targets, who come in, stop the investigation, commence a proceeding under the Freedome of Information Act, require the agency to produce its documents in camera, even Xeroxing it, whatever it is, stop what they are doing, produce the documents into the Court, have the Court review those documents in camera, ask Commission counsel to explain what the basis of exemptions claimed are.

All of that will tend to create a precedent with regard to the SEC, the Department of Justice, the NLRB. Every agency with law enforcement responsibilities will be put to the same burden of having its investigation stopped piecemeal.

Nor is there any inhibition, based on this Court's order, from this occurring selectively all throughout the course of a proceeding. A refutation or a rejection of such a case at a two-week stage in the proceeding can be reinstituted after five more weeks, and so on.

There is no real basis for protecting the agency against the completion of its investigative work, and that is really what is in store.

If we take the plaintiffs at face value, if we assume that their concern is to see a meaningful report issued by the SEC, I submit to the Court we ought to take the pressure off the Security and Exchange Commission, we ought to let it finish the project it itself decided to institute and not invoke a procedure that bypasses the very Commissioners of the agency who were delegated by Congress with the initial decision-making function.

I strenuously urge to the Court that you grant our motion for reconsideration, give us the opportunity to complete our work, and then both Mr. Marshall and Mr. Harnett, along with everyone else, will presumably be satisfied when the Commission issues a report with which it can be satisfied.

I strongly urge the Court to reconsider its order.

MR. MARSHALL: Your Honor, I would like to respond because he mentioned twice in his argument that it is not disputed or at issue that this is an investigation for law inforcement purposes. I thought I made it quite clear that I did dispute that. Certainly I haven't seen anything documented where the government had to sustain its purden that this is law enforcement.

And, incidentally, they use the phrase "law enforcement purposes" as if that is a blanket exemption. The Freedom of Information Act doesn't say that. Subdivision 7 has investigatory records compiled for law enforcement purposes, then quqlifies "but only to the extent that the production of such records would interfere with law enforcement proceedings."

They haven't identified a single law enforcement proceeding. Indeed, their release of January 8, 1976, as to the purpose of the investigation said that it was remedial.

There was an interview with someone at the SEC, which was just mailed to me from Washington, published in the New York Times, in which they said, on February 16, 1977, "No punitive action is contemplated, however, on the grounds that there was ample public information available to more knowledgeable investors, the sources said."

I don't know the sources. But I certainly think we have to get into it. I don't want to try this matter by hearsay. But, as your Honor correctly pointed out, I am on the outside of the government and I can only bring to the attention of the Court that information which is public information and which appears in the press.

THE COURT: There is probably almost a presumptio that there are law enforcement purposes involved here by the fact that Mr. Sporkin is involved.

MR. MARSHALL: I don't know. I don't think that Congress intended that because someone who is connected with a law enforcement division of an agency of government physically moves himself from Washington to New York it is really a meeting of the burden that is incumbent upon the government to prove that there is a law enforcement reason or that there is a law enforcement case.

Let's assume that there is something involved in law enforcement. The statute goes further. They have the burden of showing that it would interfere with law enforcement proceedings. And "interfere" doesn't mean inconvenience. It means interfere.

Your Honor asked him the question, and I didn't hear any real answer, how anything that they want to do would be harmed by this Court seeing Xerox copies. You are not disrupting anyone from doing anything. If it comes to a point where you see what they have to give you in camera and you need the assistance of a staff, then your Honor can determine whether you are going to be interfering with the SEC.

But I don't see that Congress passed the Freedom of Information law that said all these provisions apply except, see footnote, except for its inconvenience to the agency or it would cost the agency some expense.

All of the reasons urged upon the Court by Mr. Sporkin and by Mr. Pitt today are not in the act. For Mr. Pitt to make a conclusory assertion that everything that they have that might conceivably be given to your Honor is pre-decisional, I dispute that. But I would like your Honor to see it and let your Honor decide whether it is or not. I am not in a position to say. I am not in a position to urge upon the Court that it is pre-decisional or it isn't, that it is for law enforcement purposes and in addition would be within Subdivision (a) through (f) of Exemption 7. I am not in a position to say it because I haven't seen it. But I trust the Court, I am relying on the Court to --

THE COURT: I am sure the SEC has not abandoned Subdivision 5 either and the exemptions to which it is entitled under Subdivision 5.

MR. MARSHALL: I am sure they haven't, but I think Congress intended for the Court to determine the applicability, not for the SEC to tell the Court that it is applicable and that the Court shouldn't bother to look.

I am not questioning the integrity of anybody in this courtroom on behalf of the SEC. But Congress made a dtermination of public policy that where there is information that might be released under the Freedom of Information Act, the Court has the power and the obligation to determine de novo. And the case law says, and the statute says, in combination, the statute says by in-camera inspection.

The case law says by oral testimony or by any other means to elicit the truth.

I am sure the SEC ahs a vested interest in taking the position that it has. But I think the interest of the SEC is in not releasing the report now.

Just to come back to something that was said at the very outset of our oral argument on Day One, it is not in the best interests, I blieve, of the people of the City of New York, who are being placed in a position to vote for candidates for high administrative office in the city, to be told after an election that someone is going to be criminally prosecuted or that there is going to be law renforcement proceedings taken against backers or candidates or office holders. I think that the people of the City of New York should be spared what happened in Washington after President Nixon was re-elected for a second term.

THE COURT: Mr. Pitt, there was one thing which you said that I did not quite understand and I want to pursue it.

You said that if the Court pulled back at this stage and the SEC proceeded, that we -- and I don't remember your exact language -- would reach the stage where the plaintiffs in this action would be happy with the result.

Now, have I correctly or incorrectly quoted you?

MR. PITT: I think by and large you have correctly captured what I intended to indicate.

THE COURT: Well, I want to know whether I have or I have not. Are you suggesting a date when you believe the Commission will be issuing this report?

MR. PITT: No, your Honor. I think I have to draw a very fine line for the Court. I cannot give the Court a date upon which a report would be completed and released, and it would be irresponsible of me because it is not within my control to do.

What I can tell the Court, however, is what the commitment of this agency is. Mr. Sporkin is here. If his oral representations aren't enough, he can be sworn.

The commitment of the agency has always been to finish the report at the earliest possible moment. Indeed, I wish we were not here today and that we had had our report out, and that was our intention all along, to have finished our report at the earliest practicable moment consistent with fairness and thoroughness and completeness that have always marked the SEC's words and efforts. And it is our intention to get it out just as soon as possible.

If that means it can be done very, very quickly, which I hope it can, and long before any dates that are of relevance to Mr. Marshall, that would be fine.

Those dates as such do not control the Commission's acitivities. We cannot be bound by political considerations, as I've indicated to the Court. And yet we are sensitive to the fact that if we can complete this report consistent with our obligations as quickly as possible, the Court has my assurance, it has Mr. Sporkin's assurance, that it will be released at the very earliest practicable moment.

And that is why I believe that if we can get back to our New York office and continue reviewing work product and drafts and drafting materials instead of defending this litigation, I think we may be in a position where much of these concerns will become moot.

MR. MARSHALL: Your Honor, I think what Mr. Pitt urges is a complete distortion of the Freedome of Information Act, and I cannot accept an argument that just because Mr. Pitt and Mr. Sporkin are here in Court that the SEC is grinding to a halt with respect to preparing the finishing touches on this report.

THE COURT: You can be perfectly sure that Mr. Pitt and Mr. Sporkin and Mr. Jacobs are not working on the report right now.

MR. MARSHALL: But they haven't indicated that there is any requirement for them to be working on the report right now. Besides, your Honor, I think it is very, very important that this Court see in camera whatever it was that Mr. Pitt sought to have explained in chambers yesterday, to identify what documents should be submitted, and I don't think that the SEC is going to suffer in the least.

I think it is a sad, sad situation if by giving the Court copies of documents, as Congress suggested the Court should see, that the SEC would grind to a halt. I can't believe the SEC has been reduced to that.

THE COURT: Do you have anything further, Mr. Pitt, Mr. Sporkin?

MR. PITT: No, your Honor, except to urge that we be given the breathing space we need and to indicate that if the Court desires that, Mr. Sporkin is here in Court and can be sworn as to any matters.

I here contentions that our representations are not being challenged and yet in a sense they are, and we are fully able and prepared to make whatever representations under oath this Court needs to satisfy itself without resort to the in-camera procedures and without resort to circumventing the Commission's own administrative processes.

THE COURT: I would like to address that specific question to Mr. Sporkin.

Isn't there an inconsistency between this being a law enforcement effort and this being a report which the Commission intends to make public as quickly as possible?

MR. SPORKIN: Your Honor, there is not. Indeed, there is precedent. For example, the Penn Central case. The Commission made a report to the Congress and thereafter brought law enforcement action and brought a suit against the company, its executives as well as some of the directors in that case.

Now, that doesn't mean that the report that will be issued will be the entire report or that all we'll do is say, "Here are the files." Obviously, if there is law enforcement action that is conceivably contemplated, and if there is a public report, you've got to make sure that you are not, in effect, impeding the actions that you are going to be taking later.

But there is no inconsistency. Indeed, what really concerns me here is you have somebody coming in and right in the middle of an investigation, right as we are getting to the culmination, the end, and before the decision makers, if you will, have a chance to see what it is, what are the strategies, what are the options that are open to the Commission, to look at the document itself, to determine if there is to be action to be taken, whether it be Mr. Jacob or Mr. Pitt or neither, and to shortcircuit that at this stage, regardless of what is taking place at this time in this city, I think would be interfering with this agency.

And, you know, it concerns me when somebody said here that they ought to have the report now because a decision has to be made. Just think of having a report that maybe some young man on the staff has prepared, that hasn't been reviewed, that other information hasn't been brought to bear, that there can be not only embarrassment to the agency for putting out something that isn't factual but total embarrassment to the people involved. That is something I don't think this Court wants to do.

You know, sure, in this thing here somebody might say it is a good purpose and therefore we circumvent and we cut through well-tried and ingrained procedures. But the next time it can be for a bad purpose. And you can't go on that type of a process in this country.

Really, there is a lot at stake here. For whose benefit do we get something out now and publish this, something that can be shot down, something that isn't tested, something that does tremendous harm to some person? It is not going to help anybody. You know, it might hurt somebody or help somebody for the short term. But this is for the long term.

I have one practice when I do my job, and I think you know that. It is the regular way all the way. And you don't permit people to say, "Well, for this purpose we got to do it this way. For other purposes we have to do it that way," because one of the charges that were made in this case is that we are trying at the beginning, by some other people, to interfere with the city.

If we took that position, we would not have had the ability to make the investigation we are making here. And that is our concern. This agency, I think, as you know, does good work, and I don't think you would be here today if somebody didn't think that. And I can only assure you that this is like any other case, that when something happens in this case, we are going to be proud. The only other thing that Mr. Pitt mentioned that I am prepared, your Honor, to take the witness stand, to give you whatever satisfaction you believe you need as to what the status is of this matter and where we stand, to tell you where these documents, as far as I can tell from my perspective, are.

(Continued on next page.)

THE COURT: I think it would be helpful if you told me from where you are just as much as you can about that.

MR. SPORKIN: Okay. Yes, your Honor.

THE COURT: Just one second. I certainly would not require it to be under oath. I mean I will take a representation from you.

MR. SPORKIN: Thank you.

Where we stand right now is that I have been sent here to help Mr. Moran because we do want to expedite this matter. What we have are a number of various segments of this report. They all are in some partial kind of draft form. Some of it has to be written. Some of it we found still has to be written. But by and large this is a very early kind of a draft that is there.

What I am attempting to do, and I've organized teams to do this, is to try to verify what's in these draft papers, to make sure there is backup and that we can check out all the information. That is number one.

Number two, we are going to do -- I brought some of our senior people here to try to edit this matter and put it into some form of shape. We are attempting to collate the information to make sure that what Mr. A. has done is not inconsistent with what Mr. B. has done, or, if there is an inconsistency, what is the explanation on that.

But it is a very, very major effort. As I said, I have in excess of six of my own people here. It probably will increase to about eight to ten in Washington.

I'm hopeful that by our reviewing the matter and I am hopeful that by going through it that we could shortcircuit a very detailed review by what I would normally do in Washington once the report is finished up here.

As you know, a number of the people who worked on this report have left the Commission, Mr. Boyle, Mr. Hyland, and we have to plug in for that part too at this time. So that's where we stand at this stage.

MR. MARSHALL: May I comment, your Honor?

THE COURT: Yes.

MR. MARSHALL: It seems to me Mr. Sporkin's statement was even less informative than the information received by Mr. Pitt last night and in court yesterday. Mr. Pitt described three sections as having already been sent down to Washington, described 167 pages out of 400 being typed from some casette or tape recording. He described much more detail and in much more completeness than even Mr. Sporkin has represented to the Court today.

And, frankly, your Honor, not having seen anything, I am confused as to what really does exist and what doesn't.

I in good faith met with Mr. Moran in the early part of May, the exact date is in the papers, and Mr. Moran told me in the presence of Mr. Harnett and Mr. Greene and Mr. Lombardi of the Daily News that nine out of ten sections of the report have been completed and that because of the resignation of Mr. Hyland and Mr. Boyle he was trying to get someone in to complete the last section.

That was in May, and I don't think that Mr. Moran had any ulterior motive in telling me that. I think he was being very frank and honest with me. And it doesn't square with what Mr. Pitt said in court yesterday and what Mr. Pitt said doesn't square with what Mr. Sporkin is saying.

And I honestly don't see the harm of this court viewing in camera whatever it is they have. It seems to me that there is almost a desperateness in not allowing this court to see anything in camera, and I don't understand it and I'm fearful of that. I'm fearful of that because we are dealing with an open government, and this law enforcement exemption that they are seeking to apply has not been narrowed down to the subdivision (a) through (f) of subsection 7, and they are just saying, "Judge, take our word for it."

I think Congress was wise in substituting for jg 4

the agency the judgment and integrity of this court, and I would like to see that process carried out.

I haven't heard anything that Mr. Sporkin said --

THE COURT: Every time you say that, Mr. Marshall, I have to remind you that we are dealing not only with ehe law enforcement exemption, which is a well qualified exemption, but we are also dealing with the intra-agency communications exemption.

And if these documents are law enforcement documents and they don't fall within any of the law enforcement areas, it may well still be that the documents in toto are exempt because they are intra-agency communications that would not be producible in a litigation, which is the test.

MR. MARSHALL: Your Honor, we won't know that, will we, until you see these documents? I am not unmindful of the exemption No. 5 as well as exemption No. 7. But I think that Mr. Pitt described yesterday in a chronological, factual statement, which I don't see comes under exemption 5 or exemption 7, just a chronological factual statement of what went on in the City of New York. So that is something that doesn't come under either exemption.

But with more particularity I think that this court must be cognizant of the fact that the very chairman ug 5

of this committee, Chairman Williams, made a representation to Senator Proxmire, when he was confirmed -- it was on the basis of this letter that Senator Proxmire and the Committee voted for his confirmation as chairman, that the report would be released by the end of the summer. That, to me, is 28 days from now.

And that is the commitment that the chairman of this commission made to a ranking chairman of a Senate committee. And for them to say now that they are going to take the chairman up on charges for releasing something that is really exempt makes no sense to me whatsoever.

There has always been the presumption that the results of the investigation woulb be released to the public, not that this would be secret. And if there are to be two reports to be drawn, one for law enforcement purposes and one for disclosure to the public, this court certainly has the obligation and the right to separate the wheat from the chaff or to find those portions which are segregable and relase to the public what should be released to the public and let the Commission have in secret, for law enforcement purposes, whatever it needs.

I presume, in that connection, when they submit it to you in camera they will say, "Your Honor, this business is for law enforcement purposes in connection with this law enforcement proceeding against this proposed defendant." And I don't think that disclosing it to the court will prejudice the rights of any innocent party, because if you agree with him, you are not going to release it, and I will be content.

THE COURT: I would not expect that they would say that at all. I would expect that this might be a document which did not focus on any particular person at this time but was a general overview, and it would still come within the rubrick of a law enforcement exemption even though it had not focussed. I wouldn't expect that it would be in the nature of a SEC indictment at this stage.

MR. MARSHALL: You may be correct, your Honor. But I think the thrust of my argument is that it is for this court to see what it is they have and for this court to make that determination.

It may well be, your Honor, and I am willing to concede, that just from your Honor reading the document, from the substance of it that you could determine that an exemption should or should not apply, and I'm willing to let the chips fall where they may. But I would like that which Congress intended for this court to decide de novo take place and take place as soon as possible.

MR. SPORKIN: Your Honor, I said before I am prepared, since he doesn't believe what I said, to take the stand and let him question me, number one.

Number two, I think what Mr. Marshall is stating to you is that the only way you can satisfy the burden is by in camera inspection, and that is not what the statute says. There's got to be alternative means.

And if he wants to challenge what I've said here before, I am prepared to have him cross examine me.

MR. MARSHALL: Mr. Sporkin, you misunderstand. It is not a matter of my not believing what you said. I don't think you've said anything. You've said less than what Mr. Pitt has said. You have not answered the Judge's question to explain the inconsistency between law enforcement purposes, when you want to claim an exemption, and release of a report to the public, which the Chairman has committed himself to a Senate Committee to do.

You haven't answered that question. It is not a matter -- I apologize to you if you think I didn't believe you. I just don't think you said anything worth saying under oath.

MR. SPORKIN: If the Judge wants me to say anything further, if you have any further questions, I am prepared to answer them. I think the Judge will be satisfied. If there is anything more I can tell you, I will.

THE COURT: Gentlemen, I want to think about this, and there is no point in my doing it while I am sitting here. So why don't we take a recess.

(Recess)

THE COURT: Gentlemen, let me take up a matter which has occurred to me, which I want to explore with counsel for both sides.

The SEC has taken the position in this matter that there was no proper demand made under the Freedom of Information Act, that since there was no proper demand the administrative processes within the SEC which would deal with a proper demand were not triggered, and so there was no denial by the SEC of the request and there was no proper appeal taken and consideration of the matter by the SEC, by the Commission itself, so that the administrative remedies of the plaintiff have not been exhausted.

I did recognize, and I do recognize, the logic of this argument, and it is still in the case because the SEC has moved to dismiss and that motion has not been passed upon yet.

However, it did seem to me that given the particular and peculiar circumstances of the demand here and the persons to whom it was directed, the label that was in the body of the demand, that it was under the Sunshine laws, the fact that the letter was addressed to the Chairman of the SEC and that the response was received from the General Counsel to the SEC, it seemed to me that there was at least a strong argument that could be made that a demand was made under the Freedom of Information Act and that a denial came from the highest authority, or the apparent highest authority, within the Commission, which has brought us to the stage that we are at today and the stage at which the order was issued yesterday.

Now, somebody - I'm not sure whether it was Mr. Marshall or Mr. Pitt - referred earlier in the argument today to the fact that there has been a demand, which was apparently a proper demand, that is now pending with respect to the same documents in the SEC, that it was denied and it is now pending appeal.

Am I correct on that?

MR. MARSHALL: I had made the statement, your Honor, that the New York State Assembly Committee on Banking made a demand to the SEC under the Freedom of Information Act and the demand was denied, citing exemption 5 and exemption 7, and that by date of July 25 or 27 a letter was written saying the undersigned appeals the wrongful denial of the Freedom of Information Act request, and that was also made on behalf of the New York State Assembly Committee on Banks.

In reviewing what was demanded, they were not demanding, and I would like to be corrected, the report of the SEC. I am reading it in detail. It was just delivered to me before the court session. They were demanding copies of all testimony taken during the Commission's inquiry into the various aspects of the New York City fiscal crisis and the sale during that period by major financial institutions of New York City bonds or notes.

And I also was made aware - I have no independent verification, but this appeal seems to state - that the SEC has distributed this information,without claim of exemption under 5 or 7, to various plaintiffs who have brought bondholder actions.

I didn't know this before until I read this during the recess.

THE COURT: I don't want to move into other areas beyond this area.

Mr. Pitt, do you know anything about this?

MR. PITT: Yes, your Honor. I just checked on that.

First, a request was made to the Freedom of Information Act officer for raw investigative date, that is, transcripts of testimony. The Freedom of Information Act officer has turned that down and there is now an appeal pending before the Commission.

The Commission has as yet not ruled upon that at all, and so I'm not in a position to say what the Commission's response would be. But there has been certainly no Commission adjudication on the Freedom of Information Act question.

THE COURT: Well, my specific inquiry was going to be whether there was any way it could be worked out that Mr. Marshall's demand as made in his letter to you, Mr. Pitt, and as perhaps a little bit more precisely delineated in the court of this action, could be considered as the appeal from the Assembly Committee by the Commission.

MR. PITT: Your Honor, without addressing myself to the technical problems, it seems to me that if Mr. Marshall were to address a proper -- when I say "proper," I don't mean technically proper but I mean a request that gives us some idea now of where his focus is -- request, it seems to me that that could be processed by the Commission and it might be possible, althogh I would have to consult with the Commission, to avoid the first layer, that Freedom of Information Act officer layer, and simply present the matter to the Commission within the timeframe of the Act or shorter if possible.

But, in any event, we could check that with the Commission and see if that would be amenable to it.

THE COURT: I think it would have to be shorter if it was done at all, because my recollection is that it provides for twenty days, which would bring us well into the end of August.

MR. PITT: Your Honor, let me say this: that as a matter of settlement or somewhat of a consentual approach, I think there is clear jurisdiction to do this. My concern is that, as Mr. Sporkin has indicated, depending on what Mr. Marshall's request is, the documents are in New York. Indeed, the documents that I refer to, the two or three sections of the report that Mr. Sporkin and I have personally seen and have been brought back with us in New York for preparation of Mr. Sporkin's efforts, when we receive the Freedom of Information Act request, as I'm sure the court is aware, what happens is that the Commission causes to be made a physical search and compilation of all the documents corresponding to the request and every document is reviewed with respect to that request and then the Commission articulates a position.

I would strenuously urge that while I think the Commission would be willing to avoid any further litigation in a case that I think has created enough difficulties, I think placing the Commission under severe time constraints in this capacity without having in hand what Mr. Marshall's request would be and without seeing what would be required could prove to be terribly onerous and I would appreciate it if I could take back to the Commission, if that's what your Honor so requests, something that does not require the Commission to waive its time period.

I think there would be an understanding on the part of the Commission that we would do whatever we could to meet the time limits.

MR. MARSHALL: Your Honor, I really am chagrined at hearing what Mr. Pitt has said to the court, because in reading the appeal, and I would like Mr. Pitt to say in court whether thisis so or not, rather than 100,000 uncollated documents that would take them a generation to decipher and summarize, I now see that the SEC has already delivered, sometime ago, I don't know when, to the attorneys for the banks involved in the litigation by bondholders of bonds of the City of New York, the entire transcript of all of the testimony taken, and without any claim to the banks that any exemption applies.

I read from a letter from Alexander W. Sierck, Special Counsel, Committee on Banks, New York State Assembly, on page 2 of his appeal, in which he says that the Committee "is conducting a legislative inquiry into the role of the New York banks during the city fiscal crisis. The Committee has made diligent efforts to obtain copies of the transcripts from the banks but the banks have refused to disclose them. Moreover, even though counsel for plaintiffs in the securities fraud litigation pending against the banks has copies of such documents, counsel is under a court order of confidentiality obtained by the banks that prevents him from disclosing documents to the Committee."

If this statement is true, it means that the SEC has given to the attorneys for the banks in the securities fraud litigation copies of their raw questionnaires and depositions but they are standing in this court saying the people can't see that and, they are going further, they have the temerity to say that the court can't see it in camera.

But a lot of this raw material has already been given to the attorneys for the banks. It is okay for the banks, but it is not okay for the people.

And I resent going back to the SEC and waiting yet another thirty days or twenty days, as the Act says. I had a conversation with this man and we discussed the Freedom of Information Act ad nauseum and he wanted to know whether we are brinking an action. And I had to call four times before he spoke with me.

I called Chairman Williams and we discussed it. He knew it was a Freedom of Information Act demand and he wanted me to let him know if I was going to institute a suit.

THE COURT: Mr. Marshall, we have been through that in two previous sessions. Let's not go through it again.

MR. PITT: Your Honor, I don't want to take too much of the court's time. The Commission's rules provide that a witness in an investigation is entitled to a copy of the transcript of that investigation unless for good cause found the director of the division withholds it, his own testimony, and that's all, because every person gets their own testimony.

We withhold them in very certain cases where there are severe difficulties that we perceive, and those are made on an ad hoc basis by Mr. Sporkin in his position. But every witness in an investigation gets only his own testimony, which is the general approach of the Commission, and he pays for it.

That is all that that letter is referring to.

THE COURT: In other words, the testimony that was made available here to these banks was made available, jg 16

in effect, to a witness who testified in proceedings before the SEC.

MR. PITT: Precisely, your Honor, and they only have their own testimony and no one else's.

THE COURT: Well, gentlemen, I think we will forget that tentative suggestion I just made.

I shall abide by me order of yesterday and direct that the copies specified, the documents specified in that order be made available to me at five o'clock today.

MR. MARSHALL: Thank you, your Honor.

MR. PITT: Your Honor, if I understand you correctly, would a shorter time period be acceptable to the court in terms of the processing? Is that what your Honor is suggesting?

In other words, if I understood your question, I am in a sense unable to commit the Commission to anything without going back to it. As I indicated at the outset, we would prefer not to reach a situation where we feel that in order to have significance that would compel us to take further legal action. We would prefer to work this matter out in accordance with the provisions we've indicated.

I did not mean to foreclose with your Honor the possibility that a Freedom of Information Act request would be processed in a short period of time. I simply am not in a position to make that judgment. And if your Honor wishes, we could go back to the Commission and at least you could have that information in hand.

THE COURT: Well, I gathered from Mr. Marshall that that suggestion is not satisfactory to the plaintiff in the case.

MR. PITT: Your Honor, if that's the case and your decision is to maintain the order that you have entered yesterday, I should like to request, on behalf of the Commission, a stay pending our attempt to expeditiously seek appellate review of the court's decision.

The Commission is of the view that the significance of the issue warrants its adjudication as definitively as we can obtain it and as expeditiously as we can manage it. We think we have the right to appeal the court's decision because of the jurisdictional issues that I have indicated and otherwise. We think we have an appeal as of right.

Nevertheless, in order to avoid any questions about the jurisdiction of the Second Circuit, we believe we are constrained to seek also writs of prohibition and mandamus with respect to this matter.

This is something that the Commission does not wish to do and hoped it would not be necessary to do, and I want to stress as strongly as I can that there is no disrespect intended to the court's order or the court, but theCommission does feel that the issue is of such significance that it should seek a ruling from the Court of Appeals for this circuit, and in that context we respectfully request that you grant us a stay and we will expeditiously file papers with the Second Circuit perfecting our appeal and seeking writs of mandamus and prohibition.

THE COURT: How long a stay do you request?

MR. PITT: Well, I think, your Honor, we can file our papers with the Court of Appeals tomorrow. What we would request is that, on the assumption that we do file our papers tomorrow, that your Honor enter a stay pending the resolution of the case by the Court of Appeals.

MR. MARSHALL: I think that is asking for relief that the Court of Appeals might not even grant.

THE COURT: Mr. Pitt, what I am concerned about is that you file an appeal and it will move in normal course, which means that it might not be heard for some time. I am not prepared to enter a stay which will postpone your obligations to comply with this order for an extended period of time.

I am prepared to enter a stay which will give you an opportunity to file with the Court of Appeals and apply for a stay in the Court of Appeals.

How much time do you need for that?

MR. PITT: Your Honor, as I indicated to you, we will file our papers tomorrow. We will attempt to seek a stay from the Court of Appeals tomorrow or Thursday at the latest, if we could have until the end of this week and then report back to the court on whether the Court of Appeals has ruled on it. But you have my assurance that we will file our papers tomorrow and file our motion for a stay papers with the Court of Appeals either tomorrow or the day after.

THE COURT: Very well.

MR. PITT: Thank you, your Honor.

THE COURT: The stay is granted until Friday, August 5th at 5.00 p.m.

MR. PITT: Your Honor, I ask again whether the court's reolution today of our motion for reconsideration can also be deemed to be a denial of our motion to dismiss and to make findings by the court that it has jurisdiction, or is the court reserving that in some fashion?

THE COURT: I deny your motion to dismiss and I find the court does have jurisdiction.

MR. PITT: Thank you, your Honor.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOEL HARNETT, *et al.*,

Plaintiffs,

v.

77 Civ. 3110 (VLB)

SECURITIES AND EXCHANGE COMMISSION, *et al.*,

Defendants.

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ORDER

Upon the filing of the Complaint, and Order to Show Cause and various affidavits of the parties, and having heard oral argument on July 29, August 1 and August 2, 1977, and the Court having entered an Order on August 1, 1977, requiring the *in camera* production of certain materials of the New York Regional Office of the Securities and Exchange Commission; and upon the defendant Commission's oral motion for reconsideration of this Court's Order of August 1, 1977; and this Court having found that a Freedom of Information Act request was effectively made to, and disposed of by, the Securities and Exchange Commission; and the Court having determined that it has jurisdiction of this matter pursuant to 5 U.S.C. 552;

IT IS HEREBY ORDERED that the defendant Commission's oral motion for reconsideration be, and it hereby is, denied; and

IT IS FURTHER ORDERED that the Order entered by this Court on August 1, 1977, concerning the production of certain materials for *in camera* inspection be, and it hereby is, affirmed in all respects; and

IT IS FURTHER ORDERED that the motion of defendant Commission to dismiss this action be, and it hereby is, denied in all respects; and

IT IS FURTHER ORDERED that the Order of this Court, dated August 1, 1977, requiring the production of certain materials for *in camera* inspection on August 2, 1977, be, and it hereby is, stayed until 5:00 p.m., August 5, 1977, upon condition that the defendant Securities and Exchange Commission promptly: (1) file such pleadings as are necessary to perfect appellate jurisdiction of this Court's Orders no later than August 3, 1977, and (2) seek from the Court of Appeals for the Second Circuit a stay of this Court's Order to produce materials no later than August 5, 1977.

VINCENT L. BRODERICK
UNITED STATES DISTRICT JUDGE

Dated: August 2, 1977
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

JOEL HARNETT, *et al*.,

Plaintiffs,

v.

SECURITIES AND EXCHANGE COMMISSION, *et al*.,

Defendants.

- - - - - - - - - - - - - - - - - - -x

77 Civ. 3110 (VLB)

NOTICE OF APPEAL

Notice is hereby given that the Securities and Exchange Commission, a defendant in this proceeding, hereby appeals to the United States Court of Appeals for the Second Circuit from orders of the Honorable Vincent L. Broderick, entered on August 1 and August 2, 1977:

(1) directing the defendant Commission to submit to the court for *in camera* inspection "those portions of the report to the Commission by the New York Regional Office of the Commission concerning transactions in the securities of the City of New York and related matters which have been drafted and submitted to the Administrator or the Associate Administrator of the New York Regional Office;" and

(2) denying the defendant Commission's motion to dismiss this action and declaring that the district court has jurisdiction over the subject matter of this action.

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Dated: August 2, 1977